

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/601. Meaning of 'contract'.

## **CONTRACT (**

### **1. INTRODUCTION**

#### **(1) IN GENERAL**

##### **601. Meaning of 'contract'.**

Whilst it is probably impossible to give one absolute and universally correct definition of a contract<sup>1</sup>, the most commonly accepted definition is 'a promise or set of promises which the law will enforce'<sup>2</sup>. The expression 'contract' may, however, be used to describe any or all of the following: (1) that series of promises or acts themselves constituting the contract; (2) the document or documents constituting or evidencing that series of promises or acts, or their performance; (3) the legal relations resulting from that series<sup>3</sup>.

This title is concerned only with those contracts governed by English law<sup>4</sup>.

1 Modern definitions emphasising agreement seem more appropriate to bilateral contracts rather than unilateral contracts: see Chitty *Law of Contract* (27th Edn) vol 1 para 1-002.

2 See Pollock *Principles of Contract* (13th Edn) 1.

3 See *Corbin on Contract* vol 1 para 3.

4 As to the proper law of a contract see the Contracts (Applicable Law) Act 1990; and CONFLICT OF LAWS vol 8(3) (Reissue) para 349 et seq. See also *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/602. The nature of contract.

## **602. The nature of contract.**

The primary justifications for the enforcement of a contractual promise against a promisor are economic (the economic necessity of compelling the observance of bargains)<sup>1</sup> and moral (the moral justification that the promise was freely given)<sup>2</sup>. In the nineteenth century, these two ideas led the common law to the extreme view that there should be almost complete freedom and sanctity of contract<sup>3</sup>; but freedom of contract assumes equality of bargaining power, and subsequently both common law<sup>4</sup> and statute<sup>5</sup> have tended to lean against freedom of contract where such equality is absent. To a somewhat lesser extent, the law has interfered with<sup>6</sup> or excused a party from<sup>7</sup> literal performance of his promise. Nevertheless it remains generally true that the law of contract does not lay down rights and duties, but rather imposes a number of restrictions subject to which the parties may create by their contract such rights and duties as they wish. Thus, much litigation in the law of contract is simply to determine as a matter of construction what the promisor promised<sup>8</sup>.

1 Historically, the law of contract was divided by the forms of action used according to whether the contract was formal or informal: formal contracts (under seal) were usually sued upon as bonds (see eg *Pinnel's Case* (1602) 5 Co Rep 117a); informal contracts under the action of debt. However, from the seventeenth century, the work of these actions was gradually taken over by the action of assumpsit, where the essence of the matter was the undertaking: see eg *Slade's Case* (1602) 4 Co Rep 91a at 92b. Originally tortious in origin (see para 609 note 1 post), assumpsit eventually extended beyond simple contractual promises to include accounts stated (see para 1049 post) and claims quantum meruit, whether contractual (see para 618 post) or in restitution (see RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq). Whilst the forms of action were abolished in the nineteenth century, they continue to dominate much thinking concerned with the substantive law of contract.

In the modern law of contract, a money claim may either be for payment of an agreed sum, or for damages for breach of contract: see para 942 post.

2 See para 612 post.

3 Eg the rule of entire contracts laid down in *Cutter v Powell* (1795) 6 Term Rep 320; and see para 922 post. The extreme common law view of the freedom and sanctity of contract was never adopted with complete consistency: see notes 4-5 infra.

4 See para 613 post.

5 See eg the Consumer Credit Act 1974 s 173; and CONSUMER CREDIT para 199 ante; the Unfair Contract Terms Act 1977; and para 820 et seq post; the Unfair Terms in Consumer Contracts Regulations, SI 1994/3159; and para 790 et seq post. See further para 614 post.

6 Eg the doctrine of *The Moorcock* (1889) 14 PD 64, CA: see para 782 post.

7 Eg the doctrine of frustration: see para 897 et seq post; and *Wickman Machine Tool Sales Ltd v L Schuler AG* [1972] 2 All ER 1173 at 1182-1183, [1972] 1 WLR 840 at 853, CA, per Edmund Davies LJ; affd sub nom *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL.

8 For the rules of construction see paras 772-779 post; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 164 et seq.

## **UPDATE**

## **602 The nature of contract**

NOTES--See *Akzo Nobel UK Ltd v Arista Tubes Ltd* [2010] EWCA Civ 28, [2010] All ER (D) 03 (Feb).

Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 5--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/603. The elements of a valid contract.

**603. The elements of a valid contract.**

To constitute a valid contract (1) there must be two or more separate<sup>1</sup> and definite<sup>2</sup> parties to the contract; (2) those parties must be in agreement<sup>3</sup>, that is there must be consensus on specific matters (often referred to in the older authorities as 'consensus ad idem')<sup>4</sup>; (3) those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises<sup>5</sup>; (4) the promises of each party must be supported by consideration<sup>6</sup>, or by some other factor which the law considers sufficient<sup>7</sup>. Generally speaking, the law does not enforce a bare promise (nudum pactum) but only a bargain<sup>8</sup>.

1 See para 604 post.

2 See para 605 post.

3 See para 606 post.

4 Ie an actual or apparent meeting of the minds of the parties. The requirement of consensus ad idem is considered further in para 631 et seq post.

5 See para 718 et seq post.

6 See para 727 et seq post.

7 As to contracts of record see para 615 post; as to contracts made by deed see para 616 post.

8 See para 727 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/604. Two parties essential.

#### **604. Two parties essential.**

There must be at least two parties to a contract, a promisor and a promisee. Thus, an arrangement made between two departments or branches of the same firm or company is generally not a contract<sup>1</sup> because a person cannot contract with himself<sup>2</sup>. Where a person enters into an agreement with himself and another or others, the agreement is construed as if it had been made with the other person or persons alone<sup>3</sup>.

Where, however, a person has different capacities, he may have power to contract in his representative capacity with himself as an individual<sup>4</sup>. Contracts between two registered companies in the same group of companies should in principle be binding because of their separate legal personality; and even inter-office transactions between two branches of the same firm have constituted valid contracts where the offices acted as independent legal entities<sup>5</sup>.

1 *Grey v Ellison* (1856) 1 Giff 436.

2 *Henderson v Astwood*, *Astwood v Cobbold*, *Cobbold v Astwood* [1894] AC 150, PC (mortgagee selling by auction under power of sale cannot purchase the property himself); *Moore, Nettlefold & Co v Singer Manufacturing Co* [1904] 1 KB 820, CA (landlord selling under a distress cannot be himself the purchaser); *Ingram v IRC* [1997] 4 All ER 395, CA (failed tax scheme under which the taxpayer transferred property to a nominee who then purported to contract with the taxpayer). As to redemption and reissue by a company of its own debentures see COMPANIES vol 15 (2009) PARA 1312 et seq. A shipowner cannot charge freight in respect of the carriage of his own goods: *Keith v Burrows* (1877) 2 App Cas 636, HL; *Swan v Barber* (1879) 5 Ex D 130, CA.

3 See the Law of Property Act 1925 s 82; and SALE OF LAND; and see *Ridley v Lee* [1935] Ch 591. Formerly, such a covenant or agreement was absolutely void: *Ellis v Kerr* [1910] 1 Ch 529; *Napier v Williams* [1911] 1 Ch 361; and see para 1083 post. See also *Welling v Crosland* 123 SE 776, 129 S Ct 127 (USA 1923) (X purported to sell land to a syndicate of which he was a member, and was held entitled to specific performance against the other members of the syndicate). As to contracts with unincorporated associations see paras 765-766 post.

4 See eg *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL (administratrix); *Rowley, Holmes & Co v Barber* [1977] 1 All ER 801, [1977] 1 WLR 371, EAT (personal representative).

5 *Bremer Handelsgesellschaft mbH v Toepfer* [1980] 2 Lloyd's Rep 43, CA (Hamburg and Munich Offices of German business known in trade often to operate as separate legal entities). Distinguish the situation where two parties negotiate through a common agent: see para 651 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/605. Definite persons.

### **605. Definite persons.**

The parties to a contract must be definite persons, ascertained and existing at the time when the contract is made<sup>1</sup>. An offer may be made to the world at large<sup>2</sup>, but it can only be accepted by a definite person or definite persons, though the promisee need not be known to the promisor at the time when the contract is made<sup>3</sup>.

1 *Kelner v Baxter* (1866) LR 2 CP 174 at 185 per Willes J citing *Gunn v London and Lancashire Fire Insurance Co* (1862) 12 CBNS 694 at 703 per Williams J. Thus, a contract purporting to be made on behalf of a proposed company which is not at the time in existence is void at common law so far as the future company is concerned, and cannot be ratified by the company when formed. As to pre-incorporation contracts see COMPANIES vol 14 (2009) PARA 279 et seq. Contracts of marine insurance form an exception to the rule stated in the text. Such a contract may be made on behalf of all persons interested in the property insured, and be effectively ratified by any person who is subsequently ascertained to have an interest: see the Marine Insurance Act 1906 ss 5, 6, 86; and INSURANCE vol 25 (2003 Reissue) para 216 et seq. As to the right of a successor in office to sue on a contract made by an officer of state in his official capacity see also *Yzquierdo v Clydebank Engineering and Shipbuilding Co* [1902] AC 524, HL. As to contracts on behalf of unincorporated associations see paras 765-766 post. As to bills and notes payable to bearer or to a fictitious or non-existent person see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1428-1429. As to the requirement of certainty see para 672 post.

2 See para 639 post.

3 See para 659 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/606. Agreements.

## 606. Agreements.

Normally, agreement<sup>1</sup> is reached by process of an offer by one party, termed the 'offeror', accepted by the other, termed the 'offeree'<sup>2</sup>; and, before the offeree can enforce the offeror's promise, the offeree must give the consideration requested in the offer<sup>3</sup>. If the consideration required from the offeree is a promise, the giving of that promise is said to result in a bilateral or synallagmatic contract<sup>4</sup>, under which both sides initially exchange promises<sup>5</sup>; but, if the requested consideration is an act other than a promise, its performance is said to make a unilateral contract<sup>6</sup>, whereupon the offeror becomes bound by his offer<sup>7</sup>. It is convenient to talk in terms of two parties to an agreement; but it must be borne in mind that there may be two groups of persons<sup>8</sup>, or even three or more distinct persons or groups of persons, entering into an agreement<sup>9</sup>.

The promises of any contracting party may be express, or may be inferred by implication from his conduct<sup>10</sup>. A contract is said to be executory so long as anything remains to be done under it by any party<sup>11</sup>, and executed when it has been wholly performed by all parties<sup>12</sup>. Similarly, the promise or consideration of any contracting party may be said to be executory<sup>13</sup> or executed<sup>14</sup>.

Finally, the agreement may from its inception allow performance of a contractual promise by a third party on behalf of the promisor<sup>15</sup>; and, where that third party is not the promisor's employee<sup>16</sup>, that performance will usually take place under a sub-contract made between the promisor and the third party. If such an original contract allows performance to be sub-contracted, on ordinary agency principles<sup>17</sup> there may be a contract between the original promisee and the performer<sup>18</sup>; but, if not<sup>19</sup>, at common law there is no privity of contract between them<sup>20</sup>.

1 As to consensus ad idem see paras 603 ante, 631 post.

2 As to offer and acceptance see para 631 et seq post.

3 As to consideration see para 727 et seq post.

4 The term 'bilateral' is more commonly used in this situation; but 'synallagmatic' has been preferred on the grounds that there may be more than two parties to the contract: *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104 at 108, [1968] 1 WLR 74 at 82, CA, per Diplock LJ. 'Synallagmatic' means imposing reciprocal obligations.

5 A bilateral contract thus initially consists of mutual promises, whereas in a unilateral contract there is only one promisor: see further para 653 post. The issue of whether a promisee has made any promise which may be enforced against him may therefore turn on whether a 'contract' is unilateral or bilateral: see eg *Burton v Great Northern Rly Co* (1854) 9 Exch 507; *Khaled v Athanas Bros (Aden) Ltd* [1968] EA 31, PC.

6 In a unilateral contract it is usually the offeror who makes the promise: see eg *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA. The offer may envisage performance by, or on behalf of, the promisee.

7 See note 5 supra.

8 Frequently, such a contract may be treated as if made by two individuals, and not by two groups of individuals; but as to joint and several promises see further para 1079 et seq post.

9 Where three or more persons severally enter into an agreement, there are two possible analyses: (1) each two persons has entered into a separate contract; or (2) there is a single multi-party contract: see eg *Brown and Davis Ltd v Galbraith* [1972] 3 All ER 31, [1972] 1 WLR 997, CA; and the cases cited in para 631 note 1 post.

10 See para 618 post.

11 A unilateral contract can only ever be executory on the part of the offeror because performance of the requested act by the offeree is both acceptance and performance, eg the reward cases: see para 639 post. But a bilateral or synallagmatic contract must initially be executory on all sides: see note 5 supra.

12 An executory contract can, but an executed contract cannot, be frustrated. As to the doctrine of frustration see para 897 et seq post.

13 A promise to perform an act is good consideration, and is termed executory consideration: see para 733 post.

14 As to executory and executed consideration see para 733 post. Executed consideration must be carefully distinguished from past consideration; the former is valuable consideration but the latter is not: see paras 733, 739 post.

15 Cf attempts to assign the burden of a contract subsequent to its formation; as to such assignment see para 757 post.

16 Distinguish employees from independent contractors: see *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762; and see further EMPLOYMENT.

17 Whatever the capacity of the third party, there may be agency relationships between the three parties: see generally AGENCY.

18 *The Pioneer Container* [1994] 2 AC 324, sub nom *KH Enterprise (Cargo Owners) v Pioneer Container (Owners)*, *The Pioneer Container* [1994] 2 All ER 250, PC (sub-bailment).

19 *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940.

20 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; and see para 750 post.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/607. Imperfect contracts.

### **607. Imperfect contracts.**

A completely valid contract is one that is enforceable by all the parties to it by one of the prescribed remedies<sup>1</sup>. Such contracts must be distinguished from those with varying degrees of imperfection, namely void, voidable, unenforceable, not properly executed and cancellable contracts.

The expression 'void contract' is a commonly used and convenient term for a contract which from the beginning has no legal effect<sup>2</sup>. However, as the term 'contract' is always used so as to include some element of enforceability<sup>3</sup>, the expression 'void contract' is a paradox because in reality there is never any contract at all<sup>4</sup>. The term 'void agreement' more aptly describes the situation where an offer and acceptance does not result in legal relations<sup>5</sup>; but it is also used to describe a purported acceptance of a legally operative offer which does not amount to an acceptance in law<sup>6</sup>. The appellation 'void' has also been inaccurately used to describe an initially valid contract which ceases to have effect before its expiry in normal course, either automatically<sup>7</sup>, or by the election of one of the parties after breach<sup>8</sup>.

A 'voidable contract' is one which is initially valid, but where one or more of the parties<sup>9</sup> has a right<sup>10</sup> of election to avoid<sup>11</sup> or to continue and so validate it<sup>12</sup>. Unless and until a right of avoidance is exercised<sup>13</sup>, a voidable contract remains valid<sup>14</sup>; but, whilst the right of avoidance remains<sup>15</sup>, it may be exercised whether the contract is executory<sup>16</sup> or executed<sup>17</sup>.

An 'unenforceable contract' is one which the law will not enforce by direct legal proceedings<sup>18</sup>, but is nevertheless recognised by the law as valid so that it may be indirectly enforceable<sup>19</sup>. A contractual promise may be unenforceable by any of the parties to it<sup>20</sup>, or simply by some of them<sup>21</sup>; and the unenforceability may be perpetual<sup>22</sup> or temporary<sup>23</sup>.

By statute, a regulated agreement may be 'not properly executed'<sup>24</sup>. If so, the agreement remains binding on the creditor or owner, but is enforceable against the debtor or hirer on an order of the court only<sup>25</sup>.

Again, statute has made some contracts 'cancellable' to protect one of the parties<sup>26</sup>. Such a cancellable contract remains binding on both parties unless and until the weaker party elects to cancel it in the prescribed manner. Upon such cancellation, statute usually spells out the position of the parties<sup>27</sup>.

1 The remedies for breach of contract are considered at para 989 et seq post. See also DAMAGES.

2 Eg because of mistake as to identity: see para 704 post. A contract which is void ab initio can have no contractual effect, though it may be followed by a transaction which is itself legally operative, such as a conveyance of property. For whatever reason the contract is void, any money paid or property delivered or transferred may be recoverable in restitution: see generally RESTITUTION vol 40(1) (2007 Reissue) paras 104-106, 121. Illegal contracts are commonly spoken of as 'void' but this may be inaccurate (see para 881 et seq post) and an illegal contract may give rise to penal consequences.

3 See para 601 ante.

4 *Fawcett v Star Car Sales Ltd* [1960] NZLR 406 at 412, NZ CA, per Gresson P; *Ingram v Little* [1961] 1 QB 31 at 55, [1960] 3 All ER 332 at 340, CA, per Pearce LJ.

5 See the effect of the enactments referred to in para 867 post.

6 Eg where a contract is void ab initio for mistake as to identity (see para 704 post) or as to subject matter (see para 707 post).

7 See eg *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1, HL.

8 See eg *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1963] 1 QB 201, [1962] 2 All ER 53, CA.

9 Distinguish the power of a court under its equitable jurisdiction to set aside a contract on grounds of mistake: see *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA; and MISTAKE vol 77 (2010) PARA 52 et seq.

10 There are a number of legal rules which provide that the prima facie right to rescind is lost and that the contract be dealt with as if the innocent party had elected to validate it, eg for delay in exercising the right: *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693, CA; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 835.

11 Alternatively, this may be termed 'rescind', the two terms apparently being used interchangeably today.

12 Equity may make the contract voidable, eg for misrepresentation (see *Redgrave v Hurd* (1881) 20 ChD 1, CA; and MISREPRESENTATION AND FRAUD), or for duress, undue influence or drunkenness (see paras 709-717 post); or the contract may be rendered voidable by statute (see eg the Auctions (Bidding Agreements) Act 1969 s 3(1), (5); and AUCTION). Cf (1) the power which all the parties acting together have to agree to abandon their contract (see para 1014 post); and (2) the right to treat the contract as discharged by breach (see para 989 post).

13 The ways in which this right of election may be exercised were considered in *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 at 535, [1964] 1 All ER 290, CA; and see further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 832; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 154.

14 Thus the party against whom the contract can be avoided can pass a good title under the Sale of Goods Act 1979 s 23: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 154.

15 The grounds on which the right to avoid for misrepresentation are lost are considered in MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 814 et seq.

16 See eg the cases on anticipatory breach: see para 1001 post. In such a case, the claim to avoid a contract may first be set up by way of a defence when the party entitled to avoid the contract is sued upon it.

17 See eg *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773, HL. In such a case, the party entitled to avoid the contract may claim to have it set aside and to be restored to his original position.

18 See eg the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and para 624 post. An unenforceable contract is binding: it is not void because, if the defect is cured, it will become directly enforceable; and it is not voidable, as no party has the power of avoidance.

In one sense, there is an exception to the proposition stated in the text: see para 1018 note 5 post.

19 It may be indirectly enforced by a party holding a collateral security such as a mortgage, pledge or lien, eg as in *Re Brockman* [1909] 2 Ch 170, CA (solicitor's lien over documents in respect of statute-barred debts); and money paid or property delivered under an unenforceable contract cannot be recovered as upon total failure of consideration, whilst it may be possible to sue in restitution in respect of services rendered or money paid out in pursuance of that contract: see further para 626 post; RESTITUTION.

20 See eg the Law Reform (Miscellaneous Provisions) Act 1970 s 1 (agreements to marry, though it may be more correct to describe these as void agreements rather than unenforceable agreements). Cf the procedural bar under the Limitation Act 1980 s 5: see LIMITATION PERIODS vol 68 (2008) PARA 956.

21 See eg acts within the immunity of a foreign ambassador (Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 31); or oral contracts of guarantee (Statute of Frauds (1677) s 4 (as amended)); or against a recipient of unsolicited goods (Unsolicited Goods and Services Act 1971 s 1). A contractual term which constitutes or provides for unlawful discrimination is unenforceable as against the party discriminated against: see the Sex Discrimination Act 1975 s 77(2); the Race Relations Act 1976 s 72(2); and DISCRIMINATION vol 13 (2007 Reissue) paras 393, 478.

22 See eg the Law Reform (Miscellaneous Provisions) Act 1970 s 1; the Unsolicited Goods and Services Act 1971 s 1.

23 Thus, the immunity from direct enforcement may be waived by the person against whom the contract is unenforceable, in which case it will be fully valid and directly enforceable against him, eg where the contract was unenforceable under any of the following provisions: the Statute of Frauds (1677) s 4 (as amended); the Limitation Act 1980 s 29(5); the Diplomatic Privileges Act 1964 Sch 1 art 31.

24 See the Consumer Credit Act 1974 ss 55(2), 61(1), (2), 63(5), 64(5); and CONSUMER CREDIT paras 158, 160, 172, 183 ante.

25 See *ibid* s 65; and CONSUMER CREDIT para 169 ante.

26 See eg *ibid* s 67; and CONSUMER CREDIT para 184 ante; the Insurance Companies Act 1982 s 75 (as amended); and INSURANCE vol 25 (2003 Reissue) para 18.

27 See eg the Consumer Credit Act 1974 ss 69-73 (s 70 as amended) (see CONSUMER CREDIT paras 185-189 ante); the Insurance Companies Act 1982 ss 76-77 (as amended); the Timeshare Act 1992 s 7.

## UPDATE

### 607 Imperfect contracts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 18--While it was been held in *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711, CA, that the doctrine of proprietary estoppel may be used to give effect to a contract which does not comply with the Law of Property (Miscellaneous Provisions) Act 1989 s 2, this proposition has been doubted in *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 4 All ER 713; see further SALE OF LAND vol 42 (Reissue) PARA 29.

NOTES 21, 22--1971 Act s 1 repealed: SI 2000/2334. See now Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 657).

NOTES 26, 27--Insurance Companies Act 1982 repealed: SI 2001/3649. See now the Financial Services and Markets Act 2000; and FINANCIAL SERVICES AND INSTITUTIONS.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/608. Contracts distinguished from other relationships.

### **608. Contracts distinguished from other relationships.**

Some arrangements can never be enforceable as contracts either directly or indirectly, because they are too vague<sup>1</sup>, or by reason of their nature<sup>2</sup>. Other agreements may operate within the law of contract by reason of the rules of estoppel<sup>3</sup>. A third group of cases may fall within and have their legal consequences determined exclusively by other branches of the law such as that relating to gifts<sup>4</sup>, restitution<sup>5</sup>, torts<sup>6</sup> or trusts<sup>7</sup>; or that relating to non-contractual bailments<sup>8</sup> or licences<sup>9</sup>. Several of them have been used to afford a remedy where there is a contractual promise, but no privity of contract<sup>10</sup>. A fourth group of cases may fall within both the law of contract and one of the other branches of the law just enumerated<sup>11</sup>. Within this latter group the courts have adopted no consistent attitude on the question whether the plaintiff should have a free choice of remedy<sup>12</sup>, or have the matter determined by the substance of the action<sup>13</sup> or the wording of the statute<sup>14</sup>; or whether the matter be one of public or private law<sup>15</sup>.

A fifth group of cases used to fall within the law of contract, but are now more appropriately dealt with in the context of the tort of negligent misstatement<sup>16</sup>.

1 For uncertainty as to parties see para 605 ante; and as to terms see para 672 post.

2 Eg the professional services of a barrister (see *Kennedy v Broun* (1863) 13 CBNS 677; and the cases cited in LEGAL PROFESSIONS vol 66 (2009) PARA 1305 et seq); a government subsidy scheme (*Australian Woollen Mills Ltd v Commonwealth of Australia* [1955] 3 All ER 711, [1956] 1 WLR 11, PC); the Post Office in accepting postal packets (see *Triefus & Co Ltd v Post Office* [1957] 2 QB 352, [1957] 2 All ER 387, CA; and POST OFFICE); and the examination of degrees (*Thorne v University of London* [1966] 2 QB 237, [1966] 2 All ER 338, CA).

3 Eg a clause in a contract whereby the parties agree a statement of past facts may operate, not as a promise, but merely as an estoppel: see *Lowe v Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA. But see the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4), Sch 3 para 1(q); and para 794 post.

4 See eg *Re Whitehead* [1948] NZLR 1066, NZ CA; *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA; and see generally GIFTS.

5 See eg *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; and see RESTITUTION.

6 See eg *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107; and see EXECUTORS AND ADMINISTRATORS; *Edwards v Mallan* [1908] 1 KB 1002, CA; and see further CARRIAGE AND CARRIERS vol 7 (2008) PARA 765; COURTS; NEGLIGENCE vol 78 (2010) PARA 1 et seq; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280; and see further BAILMENT vol 3(1) (2005 Reissue) para 1 et seq. Remedies in both contract and tort (negligent misstatement) were denied in *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785, [1977] 1 WLR 444.

7 See eg *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL; and see further TRUSTS.

8 See eg *The Winkfield* [1902] P 42, CA; and see generally BAILMENT.

9 See eg *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258, CA; *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA; and see further LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 9 et seq; *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA; and see further EQUITY; ESTOPPEL vol 16(2) (Reissue) para 1040; *Chappell (Fred) Ltd v National Car Parks Ltd* (1987) Times, 22 May; *Hinks v Fleet* [1986] 2 EGLR 243, CA. See also the cases on the right to work, eg *Nagle v Feilden* [1966] 2 QB 633, [1966] 1 All ER 689, CA; *Cooke v Football Association Ltd* [1972] CLY 516.

10 See para 754 et seq post.

11 See eg *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL (contractual licence); *Jackson v Mayfair Window Cleaning Co Ltd* [1952] 1 All ER 215, CA; *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA; *Matthews v Kuwait Bechtel Corp* [1959] 2 QB 57, [1959] 2 All ER 345, CA; *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99, [1975] 1 WLR 1095, CA; *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554, [1978] 2 All ER 445, CA; *Cynat Products Ltd v Landbuild (Investment and Property) Ltd* [1984] 3 All ER 513 (contract and tort); and *Re Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA (contract and trust). As to the overlap of contract and tort see para 609 post.

12 *Edwards v Mallan* [1908] 1 KB 1002, CA; *Matthews v Kuwait Bechtel Corp* [1959] 2 QB 57, [1959] 2 All ER 345, CA. As to waiver of tort see RESTITUTION vol 40(1) (2007 Reissue) para 161 et seq.

13 See eg *Clark v Kirby-Smith* [1964] Ch 506, [1964] 2 All ER 835; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197, [1964] 3 All ER 577.

14 Cf *Re Great Orme Tramways Co* (1934) 50 TLR 450.

15 See eg *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152, [1984] 3 All ER 425, CA (private right); *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554, [1984] 3 All ER 854 (public law); *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, [1992] 1 All ER 705, HL (private right, whether or not a contract).

16 See para 744 post.

## UPDATE

### 608 Contracts distinguished from other relationships

NOTE 3--SI 1994/3159 reg 4(4), Sch 3 para 1(q) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 reg 5(5), Sch 2 para 1(q).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/609. The relationship between contract and tort.

### **609. The relationship between contract and tort.**

Even leaving aside the historical difficulties in the relationship between contract and tort caused by the forms of action<sup>1</sup>, a number of issues arise. First, there are in general these substantive differences between contract and tort<sup>2</sup>: whilst duties in tort are chiefly determined by the law<sup>3</sup>, those in contract are chiefly determined by the parties<sup>4</sup>; and, whilst in tort duties are commonly owed to persons generally<sup>5</sup>, those in contract are towards a specific person or persons<sup>6</sup>. These differences may be seen reflected in the law relating to the following: assignment<sup>7</sup>; capacity of the parties<sup>8</sup>; conflict of laws<sup>9</sup>; damages<sup>10</sup>; limitation of actions<sup>11</sup>; service of writs outside the jurisdiction<sup>12</sup>; and the requirement of consideration<sup>13</sup>. Secondly, in those cases which fall within both the law of contract and the law of tort, there is the question of whether one contracting party can choose to sue the other contracting party in tort<sup>14</sup>. Thirdly, there may be an issue of whether the terms of a contract may affect tortious liability between one contracting party and a third party<sup>15</sup>.

1 Tortious remedies were granted under the action of trespass or the action on the case; and out of the action on the case there was developed the action of assumpsit: see para 602 note 1 ante. See Chitty *Law of Contract* (27th Edn) vol 1 para 1-042.

2 See Winfield *Province of the Law of Tort* p 380.

3 But the consent of the injured party may prevent liability arising by reason of the doctrine of *volenti non fit injuria* (eg *Condon v Basi* [1985] 2 All ER 453, [1985] 1 WLR 866, CA); as may disclaimer by the party causing the injury (see eg *Ashdown v Samuel Williams & Sons* [1957] 1 QB 409, [1957] 1 All ER 35, CA; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL). As to the incorporation of exclusion clauses and disclaimers in transactions see para 801 et seq post.

4 But in many instances, this freedom to decide contractual terms may be reduced by law to a choice of whether or not to contract: see eg the Unfair Contract Terms Act 1977; the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; and para 790 et seq post. Freedom of legal consequences may also be restricted by law, eg by frustration: see para 909 et seq post.

5 This appears more true of the tort of negligence than some other torts, eg inducing a breach of contract or wrongful interference with goods: see para 611 post.

6 As to the parties to a contract see paras 604-605 ante.

7 Generally, a debt can be assigned (see CHOSSES IN ACTION vol 13 (2009) PARA 72 et seq), whereas a right of action in tort cannot (see para 850 post).

8 Generally, a minor is liable for his torts whereas his liability in contract is limited: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 12 et seq.

9 The conflict of laws rules are different for contract and tort: see CONFLICT OF LAWS vol 8(3) (Reissue) paras 349 et seq, 366 et seq.

10 There are significant differences between the measures of damages recoverable in contract and tort: see generally DAMAGES.

11 Although both contract and tort claims basically have the same limitation period, there are important differences as to the time from which the cause of action accrues: see LIMITATION PERIODS vol 68 (2008) PARA 952 et seq.

12 See the Civil Jurisdiction and Judgments Act 1982 s 2; and CONFLICT OF LAWS vol 8(3) (Reissue) paras 65-68.

13 See para 744 post.

14 See para 610 post.

15 See para 611 post.

## **UPDATE**

### **609 The relationship between contract and tort**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 4--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/610. Suing the other contracting party in tort.

### **610. Suing the other contracting party in tort.**

The traditional rule was that where the injured party's claim against the guilty party could be framed in contract or tort, he could normally choose upon which basis to proceed. However, in 1985 Lord Scarman observed in the Privy Council that, particularly in a commercial relationship, 'Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship'<sup>1</sup>. In practice, attitudes may differ according to whether or not the tort arises at the pre-contractual stage.

In respect of pre-contractual statements, liability may prima facie arise for misrepresentation<sup>2</sup>, irrespective of whether or not the misrepresentation becomes a contractual promise<sup>3</sup> or the representee chooses to exercise any right of rescission for misrepresentation<sup>4</sup>. But a contractual exclusion clause cannot be relied on so as to avoid tortious liability for fraud<sup>5</sup>; and the legal protection of contracting minors cannot be avoided by suing in tort, as in respect of fraudulent misrepresentation of age<sup>6</sup>. Further, there are special rules for duress<sup>7</sup>, implied contract<sup>8</sup> and non-disclosure. As to silence, generally tortious liability for failure to speak has been restricted to circumstances where a person has voluntarily accepted responsibility<sup>9</sup>.

Where a claim arises from the performance or non-performance of a contract, the injured party may see advantage in suing in tort rather than contract<sup>10</sup>. The older authorities were conflicting, some allowing but others denying an action in tort<sup>11</sup>. The modern cases accept the possibility of a tortious duty of care arising in circumstances where there is a contractual duty, the two duties being concurrent, but not necessarily co-extensive<sup>12</sup>; but they draw several distinctions. First, where the contract is silent on the point, there are these considerations: if the tort is completely unrelated to any contract, there may be no reason why the existence of that contract between the parties should have any effect on the tort action between them<sup>13</sup>; but it may be otherwise if the tort action is being used to make good the silence of the contract<sup>14</sup>. Secondly, leaving aside the special case where a threatened breach of contract may amount to a well established tort<sup>15</sup>, it seems that a tort action will not usually<sup>16</sup> be allowed just to circumvent a term of the contract, either express<sup>17</sup> or implied<sup>18</sup>; nor to circumvent any legal immunity in the law of contract<sup>19</sup>; nor, perhaps, to circumvent an absence of privity<sup>20</sup>. Thirdly, a tort action has sometimes been allowed in respect of omissions<sup>21</sup>.

1 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107, [1985] 2 All ER 947 at 957.

2 Eg in the torts of deceit or negligent misstatement, or under the Misrepresentation Act 1967: see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 725 et seq.

3 *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA; *BG Checo International Ltd v BC Hydro and Power Authority* (1993) 99 DLR (4th) 577, Can SC (breach of contract); *R v Cognos Inc* (1993) 99 DLR (4th) 626, Can SC (misrepresentation did not amount to a breach of contract).

4 *Archer v Brown* [1985] QB 401 at 415, [1984] 2 All ER 267 at 275.

5 See para 800 post.

6 *Johnson v Pye* (1665) 1 Sid 258; *Stikeman v Dawson* (1847) 1 De G & Sm 90; *R Leslie Ltd v Sheill* [1914] 3 KB 607 at 612 per Lord Sumner; and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 23.

7 Duress may give rise to the right to avoid the contract: see paras 710-711 post. This will not necessarily give rise to an action for damages: *Universe Tankships Inc of Monrovia v International Transport Workers*



*Federation* [1983] 1 AC 366 at 385, [1982] 2 All ER 67 at 76-77, HL, per Lord Diplock. But duress might amount to the tort of intimidation: see note 15 infra.

8 *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 3 All ER 25 at 31, [1990] 1 WLR 1195 at 1202, CA, obiter per Bingham LJ (the facts were unlikely to give rise to any claim for the tort of negligence).

9 Where rescission is claimed on grounds of misrepresentation, the law generally refuses liability for non-disclosure: see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 751. Whilst non-disclosure might give rise to a claim in damages on grounds of negligent misstatement (see para 611 post), this is unlikely to be the case in the absence of the voluntary assumption of responsibility: *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 at 794, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952 at 1007, CA, per Slade LJ; affd on other grounds sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1991] 2 AC 249, [1990] 2 All ER 947, HL.

10 For instance, there may be differences between contract and tort in relation to the following: (1) capacity to contract or commit a tort, eg *Balsett v Mingay* [1943] KB 281, [1943] 1 All ER 143, CA; (2) the measure of damages, eg *Ford v White & Co* [1964] 2 All ER 755, [1964] 1 WLR 885; *Thake v Maurice* [1986] QB 644, [1986] 1 All ER 497, CA; *Swingcastle Ltd v Alastair Gibson* [1991] 2 AC 223, [1991] 2 All ER 353, HL; *Wessex Regional Health Authority v HLM Design Ltd* (1994) 71 BLR 32; (3) remoteness of damage, eg *Koufos v C Czarnikow Ltd, The Heron II* [1969] 1 AC 350, [1967] 3 All ER 686, HL; *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, [1978] 1 All ER 525, CA; (4) contributory negligence, eg *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1988] 2 All ER 43, CA (affd on other grounds [1989] AC 852, [1989] 1 All ER 402, HL); *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA; (5) limitation of actions, eg *Midland Bank Trust Co v Hett, Stubbs & Kemp* [1979] Ch 384, [1978] 3 All ER 571; *Iron Trades Mutual Insurance Co Ltd v JK Buckenham* [1990] 1 All ER 808, [1989] 2 Lloyd's Rep 85; and (6) conflict of laws, eg *Matthews v Kuwait Bechtel Corp* [1959] 2 QB 57, [1959] 2 All ER 345, CA; *Coupland v Arabian Gulf Petroleum Co* [1983] 3 All ER 226, [1983] 1 WLR 1136, CA. See further CONFLICT OF LAWS; DAMAGES; LIMITATION PERIODS; TORT.

11 See eg *Govett v Radnidge* (1802) 3 East 62; *Orton v Butler* (1822) 5 B & Ald 652; *Boorman v Brown* (1842) 3 QB 511, Ex Ch; affd sub nom *Brown v Boorman* (1844) 11 Cl & Fin 1, HL.

12 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 192-193, [1994] 3 All ER 506 at 531-532, HL, per Lord Goff of Chieveley; *Holt v Payne Skillington* (1995) 77 BLR 51, CA, obiter per Hirst LJ.

13 *National Bank of Greece SA v Pinios Shipping Co No 1* [1990] 1 AC 637 at 651, [1989] 1 All ER 213 at 223-224, CA, per Lloyd LJ (on appeal [1990] 1 AC 637, [1990] 1 All ER 78, HL); *Barclays Bank plc v Khaira* [1992] 1 WLR 623; revsd on other grounds [1993] 1 FLR 343, CA.

14 As where the contract is held not to contain an implied term (see para 789 post) and an attempt is made to sue for negligent misstatement: some authority suggests that a tort claim may be allowed (eg *Rimmer v Liverpool City Council* [1985] QB 1, [1984] 1 All ER 930, CA; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 at 820, [1976] 2 All ER 5 at 15, CA, per Lord Denning MR, at 827 and 21 per Ormrod LJ and at 832 and 26 per Shaw LJ); others that it will not (eg *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228, [1990] 1 WLR 212, CA; *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389, [1990] 1 WLR 235, CA; *National Bank of Greece SA v Pinios Shipping Co No 1* [1990] 1 AC 637, [1989] 1 All ER 213, CA (revsd on other grounds [1990] 1 AC 637, [1990] 1 Lloyd's Rep 225, HL); *Greater Nottingham Co-Operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, CA). But the latter view might appear to suggest that the silence of the contract impliedly ousts the tort, a view seemingly inconsistent with the approach of the courts to the exclusion of liability in tort, where express words are usually required: see para 806 post.

15 Eg the tort of intimidation: see para 709 note 19 post.

16 The consent of an injured party will avoid tort liability: *Chapman v Lord Ellesmere* [1932] 2 KB 431, CA; *Sidaway v Governors of the Bethlem Royal Hospital* [1985] AC 871, [1985] 1 All ER 643, HL; but contrast the approach of the courts to contractual clauses purporting to exclude liability in the tort of negligence: see para 806 post.

17 On the basis of the ordinary principles of construction: see *Johnstone v Bloomsbury Health Authority* [1992] QB 333, [1991] 2 All ER 293, CA.

18 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] AC 80, [1985] 2 All ER 947, PC; *Blackwood v Robertson* 1984 SLT 68, Sh Ct. As to implied terms see para 778 et seq post.

19 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1990] 1 QB 818, [1989] 3 All ER 628, CA; revsd on other grounds [1992] 1 AC 233, [1991] 3 All ER 1, HL.

20 See *Sealand v Robert McHaffie* (1974) 51 DLR (3d) 702, BC (employer's contractual duty not to be imposed on employee as a duty in the tort of negligent misstatement). For exceptions see para 754 et seq post.

21 As to negligent misstatement see paras 744, 759 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(1) IN GENERAL/611. The effect of contract on a third party in tort.

### **611. The effect of contract on a third party in tort.**

A contract may affect the relationship in tort<sup>1</sup> between one of the contracting parties (A or B) and a third party (C) either positively or negatively.

A contract may positively affect C's liability in tort to A or B for wrongfully inducing a breach of contract<sup>2</sup>; this may be so even though more damages are recoverable in the tort than for breach of contract<sup>3</sup>; or though the interference does not give rise to contractual liability<sup>4</sup>. Further, A may be liable in the torts of intimidation or conspiracy to C for threatening B that A will break his contract with B unless B does, or refrains from doing, some act and thereby damages C<sup>5</sup>. Moreover, a title-transferring contract between A and B may affect the liability of C for wrongful interference with goods<sup>6</sup>.

A contract may negatively affect C's position in tort in one of two ways. First, the mere existence of the contract may affect the creation of tortious duties. Whilst in the nineteenth century the courts sometimes denied that a breach of contract could give rise to an action in tort by C<sup>7</sup>, in 1932 it was pointed out that 'there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort'<sup>8</sup>. Indeed, at one stage, it was even claimed that a contractual flavour was itself a ground for the imposition of a tortious duty of care: such an argument was put forward both at the creation of the tort of negligent misstatement<sup>9</sup> and to allow recovery of pure economic loss caused by a negligent act<sup>10</sup>. Subsequently, the courts seem to have moved back towards their nineteenth century view: it has been held that the existence of a contract between A and B may lead to a denial or modification of A's liability in tort to C<sup>11</sup>, or C's liability in tort to A or B<sup>12</sup>. On the other hand, there have also been indications that the courts may once again be more receptive to claims for pure economic loss caused by negligent misstatement<sup>13</sup> or act<sup>14</sup>. Notwithstanding the privity rule<sup>15</sup>, at common law the terms of the contract between A and B may sometimes modify the effect of an established tort as between A and C, as where C has notice of a disclaimer<sup>16</sup>; or by way of a collateral contract<sup>17</sup>; or where it was thought that the existence of a duty of care would disrupt the 'contractual structure'<sup>18</sup>.

1 As to whether a matter gives rise to an action in contract may depend on the doctrine of privity: see para 748 et seq post.

2 See eg *Lumley v Gye* (1853) 2 E & B 216; *Granby Marketing Services v Interlego AG* [1984] RPC 209; *Law Debenture Trust Corp plc v Ural Caspian Oil Corp Ltd* [1995] Ch 152, [1995] 1 All ER 157, CA; *Timeplan Education Group Ltd v National Union of Teachers* [1997] IRLR 457, CA.

3 See *Lumley v Gye* (1853) 2 E & B 216.

4 As to where the other party is protected by an exclusion clause see *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, [1969] 1 All ER 522, CA. As to where no breach of the primary obligations of the contract is caused see *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570 at 607-610, [1982] 2 All ER 189 at 195-197, HL, per Lord Diplock.

5 See para 759 notes 18-19 post.

6 See the Torts (Interference with Goods) Act 1977 s 1 (as amended); and TORT.

7 *Winterbottom v Wright* (1842) 10 M & W 109.

8 *Donoghue v Stevenson* [1932] AC 562 at 610, HL, per Lord Macmillan.

9 In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL, one of the circumstances said to give rise to a 'special relationship' creating the tortious liability was something 'equivalent to contract': see at 529 and 610 per Lord Devlin. In subsequent cases, the emphasis has been placed, not on the negligence, but on a special relationship akin to a fiduciary relationship: see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 204-205, [1994] 3 All ER 506 at 543, HL, and *White v Jones* [1995] 2 AC 207 at 271, [1995] 1 All ER 691 at 713, HL, both per Lord Browne-Wilkinson.

10 *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201, HL, where one of the reasons given was that the 'special relationship' between the parties fell 'only just short of a direct contractual relationship' (see at 533 and 204 per Lord Fraser of Tullybelton). This approach to tortious liability for pure economic loss has not been followed in subsequent cases: see *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, [1984] 3 All ER 529, HL; and DAMAGES; TORT.

11 *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560 at 570-571, [1992] 1 All ER 865 at 870; *Ogden (Claude R) & Co Pty v Reliance Fire Sprinkler Co Pty* [1975] 1 Lloyd's Rep 52, Aust SC.

12 See *Balsamo v Medici* [1984] 2 All ER 304, [1984] 1 WLR 951; *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758, [1988] 1 All ER 791, CA; *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA; *Marc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211, [1995] 3 All ER 307, HL; *Edgeworth Construction Ltd v ND Lea & Associates* (1993) 107 DLR (4th) 169, Can SC.

13 See *Smith v Eric S Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 113 et seq.

14 *Punjab National Bank v de Boinville* [1992] 3 All ER 104, [1992] 1 WLR 1138, CA; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL (indirect names); *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL; *Conway v Crowe Kelsey & Partners* (1996) 39 ConLR 1.

15 See *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; and para 749 post.

16 *Pacific Associates Inc v Baxter* [1990] 1 QB 993 at 1022-1023, [1989] 2 All ER 159 at 179, CA, per Purchas LJ, and at 1033 and 187-188 per Ralph Gibson LJ; *Smith v Eric S Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL.

17 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC.

18 *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA; *London Drugs Ltd v Kuehne & Nagel International Ltd* [1990] 4 WWR 289, BC CA; and see para 759 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(2) GOOD FAITH/612. Introduction.

## (2) GOOD FAITH

### 612. Introduction.

The English courts are well used to the notion that something must be done bona fide<sup>1</sup> or in good faith<sup>2</sup> and with its converse where something is done male fide or in bad faith<sup>3</sup>. A good example of the application of a requirement of good faith in English law is the rule that a bona fide purchaser for value of property without notice takes a good title free of prior equities. For instance, this rule applies in favour of a holder in due course (a bona fide purchaser) of a bill of exchange<sup>4</sup>; and in relation to the circulation of currency<sup>5</sup>, pledges or sales of goods by a buyer with a voidable title<sup>6</sup> and the purchaser of a legal estate in land<sup>7</sup>.

With respect to contract law, the wider civil law concept of good faith as an overriding principle of fair dealing<sup>8</sup> never took root in English common law<sup>9</sup>. In the nineteenth century, it became settled that in English common law, the concept of good faith usually means just honesty<sup>10</sup>: the proposal that good consideration might be provided by a mere motive, such as a moral obligation, was rejected<sup>11</sup>. Such a rejection is traditionally explained by the impact of the subjective classical doctrines of freedom and sanctity of contract which then prevailed<sup>12</sup>.

However, the fusion of law and equity in 1875 provided another opportunity to re-introduce notions of good faith into the English law of contract<sup>13</sup>, particularly with regard to the additional<sup>14</sup> equitable remedies hitherto principally obtainable in the courts of equity<sup>15</sup>. Since then, there have been some instances where English statute law, sometimes directly, has imported the concept of civil law good faith<sup>16</sup>; and there are a growing number of instances where the English courts appear to have done so indirectly<sup>17</sup>.

1 'There are three things to be considered [in an action about a fraudulent deed] fraud, consideration and bona fide; now the bona fide is opposite to fraud': *Lord Teynham v Mullins* (1674) 1 Mod Rep 119 at 119 per Hale CJ. The equivalent of this phrase [bona fide] is 'honestly': see *R v Holk*(1881) 7 QBD 575 at 580, CA, per Bramwell LJ. To take a negotiable instrument 'bona fide' means really and truly for value: *Raphael v Bank of England* (1855) 17 CB 161 at 172 per Cresswell J. Bona fide use of a trademark 'means honest use by the person of his own name, without any intention to deceive anybody': *Baume & Co Ltd v AH Moore Ltd*[1958] Ch 907 at 921, [1958] 2 All ER 113 at 123, CA. See also *Moore v Woolsey* (1854) 24 LJQB 40 (bona fides in a life policy); *Lovesey v Stallard*(1874) 38 JP 391 (bona fide claim of right); *Sykes Case*(1872) LR 13 Eq 255 (bona fide payment of calls on director's shares); *London and County Banking Co Ltd v London and River Plate Bank Ltd*(1888) 21 QBD 535, CA (a bona fide holder for value of bonds, etc); *R v Tolson*(1889) 23 QBD 168 (bona fide belief first spouse dead); *Derry v Peek*(1889) 14 App Cas 337, HL (bona fide belief in statements made); *Hudson v Gribble*[1903] 1 KB 517, CA (duties and other sums 'really and bona fide paid'); *A-G v Johnson*[1903] 1 KB 617, CA ('bona fide sale'); *Dafen Tinplate Co Ltd v Llanelly Steel Co (1907) Ltd*[1920] 2 Ch 124 ('bona fide for the benefit of company as a whole'); *Re Welsh Brick Industries Ltd*[1946] 2 All ER 197, CA (whether a debt bona fide disputed).

2 In *Jones v Gordon*(1877) 2 App Cas 616, HL, Lord Blackburn drew a distinction between a person who was 'honestly blundering and careless' and one who proceeded with a transaction without honest belief that the transaction was a valid one, that is, with 'a suspicion that something was wrong' but refraining from making further inquiry. In *Mogridge v Clapp*[1892] 3 Ch 382 at 391, CA, Kekewich J said that the words 'good faith' 'are the exact equivalent in every sense of the expression which is perhaps more commonly used, though not more correctly or properly, bona fides'.

3 'Bad faith' means dishonesty, though not necessarily for a financial motive, and does not cover an honest, though mistaken, taking into consideration of a factor which was in law irrelevant: *Cannock Chase District Council v Kelly*[1978] 1 All ER 152, [1978] 1 WLR 1, CA.

4 See the Bills of Exchange Act 1882 s 38; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1488.

5 *Wookey v Pole* (1820) 4 B & Ald 1 at 6 (coins); *Miller v Race* (1758) 1 Burr 452 (bank notes).

6 *Whitehorn Bros v Davison* [1911] 1 KB 463, CA (pledge); and see the Sale of Goods Act 1979 s 23; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 154.

7 See *Pilcher v Rawlins* (1872) 7 Ch App 259 at 269 per James LJ.

8 Illustrative of the civil law concept mentioned in the text is the French notion of good faith in contract law, the guiding idea of which is that whilst the judges cannot give the victim more than the law allows under the contract, they can prevent the guilty party from exercising the fullest civil rights which the law would otherwise allow him under the contract. Although the French Civil Code only expressly requires good faith in the performance of contracts (see art 1134-3), the French courts also impose requirements of good faith at the earlier stages of pre-contractual negotiation and in the formation of contract. Particularly since the 1970s, the notion of good faith has been used by the French courts to import morality and justice into contracts, commonly by way of interpretation and implied terms (relying on arts 1134-3, 1135, 1156). The consequences of acting in bad faith tend to include increased liability in damages and loss of ability to exercise certain contractual rights. For instance, a party who has acted in bad faith cannot require the other side to perform the contract as if nothing had happened; he may not be able to rely on a limitation or exclusion clause, or a penalty clause, or termination clause, or on a slight breach to terminate a contract. See further Terre *Droit civil, les obligations* 6ième Edn 1998, Dalloz, pp 347-438; Benabent *Droit Civil, les obligations* 6ième Edn 1998, Montchrestien, pp 87, 285, 383; Le Tourneau *Bonne Foi in Répertoire Civil Dalloz*, 1995; and Association H Capitant, *La Bonne Foi Travaux Association H Capitant*, t XLIII 1994, Edn Litec.

9 English courts have, however, long been familiar with the notion of good faith as meaning honesty, perhaps because of the reception of the law merchant into the common law (eg (1) bills of exchange (codified in the Bills of Exchange Act 1882); (2) sales of goods in market overt (*The Case of Market Overt* (1596) 5 Co Rep 83b; but this rule was excised from English law by the Sale of Goods (Amendment) Act 1994); (3) the law of bailment (*Coggs v Barnard* (1703) 2 Ld Raym 909; and see para 744 post). The jurisdiction of the ecclesiastical courts over moral obligations (fides facta) was suppressed by the medieval common law). Moreover, during the eighteenth century judicial attempts were made to incorporate into the English law of contract notions of good faith which went wider than requiring mere honesty (in *Carter v Boehm* (1766) 3 Burr 1905 at 1919, Lord Mansfield referred to good faith as 'the governing principle applicable to all contracts and dealings'. See also *Melish v Motteaux* (1792) Peake 115). In this phase, the courts, under the leadership of Lord Mansfield CJ, tried to dispense altogether with the requirement of consideration for written contracts, treating consideration as mere evidence of the intention of the parties to be bound, a requirement which could be satisfied by other means, such as writing (see *Pillans v Van Mierop* (1756) 3 Burr 1663. But this ruling was reversed in *Rann v Hughes* (1778) 4 Bro Parl Cas 27 at 31, which settled that the courts would not enforce a mere nudum pactum: see para 727 note 4 post). Driven back from this, the courts accepted that sufficient consideration might be supplied by a moral obligation (*Wennall v Adney* (1802) 3 Bos & P 247; but this view was repudiated in *Eastwood v Kenyon* (1840) 11 Ad & El 438), such as marriage (*Harrison v Cage* (1698) 1 Ld Raym 386; *Hutton v Mansell* (1705) 3 Salk 16; *Daniel v Bowles* (1826) 2 C & P 553; *Gough v Farr* (1827) 2 C & P 631; *Short v Stone* (1846) 8 QB 358; *Vineall v Veness* (1865) 4 F & F 344; *Skipp v Kelly* (1926) 42 TLR 258, PC; *Shaw v Shaw* [1954] 2 QB 429, [1954] 2 All ER 638, CA. This rule was reversed by statute in 1970: see para 742 post) or by some nominal consideration (*Bainbridge v Firmston* (1838) 1 Per & Dav 2 (bailment so that bailee might weigh boilers); *Thomas v Thomas* (1842) 2 QB 851 (widow to have use of family house)).

10 For a more detailed discussion of the impact of good faith in English law see Beatson and Friedmann *Good Faith and Fault in Contract Law* (Clarendon Press, 1995). See also *Good Faith in Contract: Concept and Context* ed Brownsword, Howells and Hird (Dartmouth, 1998).

11 See para 737 post.

12 Contrast the position in insurance contracts, where the principle uberrimae fidei prevailed (see INSURANCE vol 25 (2003 Reissue) para 36 et seq) and the numerous fiduciary duties imposed on an agent (see AGENCY vol 1 (2008) PARA 73).

13 The origin of the principles of equity lay in the jurisdiction of the Chancellor, in early times often a cleric, who would grant remedies according to his conscience to mitigate the harshness and rigidity of the common law. See generally EQUITY vol 16(2) (Reissue) para 402 et seq.

14 At common law, the ordinary remedy for breach of contract was, and remains, an action for damages: see para 1012 post; and DAMAGES. Equitable remedies were, and remained, discretionary and were available to supplement deficiencies of the common law.

15 The principal equitable remedies available to supplement the common law of contract were, and remained, injunctions, rectification and specific performance: see para 1012 post.

16 See para 614 post.

17 See para 613 post.

## **UPDATE**

### **612 Introduction**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(2) GOOD FAITH/613. Good faith in English common law.

### 613. Good faith in English common law.

The laissez-faire attitude of the English courts in the nineteenth century towards freedom of contract and their lack of intervention inevitably led to their taking a narrow view of good faith<sup>1</sup>; nevertheless it became settled that the court might strike down agreements on grounds of illegality<sup>2</sup>, incapacity<sup>3</sup>, mistake<sup>4</sup>, duress<sup>5</sup>, misrepresentation<sup>6</sup>, implied terms<sup>7</sup>, frustration<sup>8</sup> and unfairness<sup>9</sup>.

Moreover, by using the principles of equity, the courts have diminished the severity of common law principles. They have done so by employing the rules of promissory estoppel<sup>10</sup>, specific performance<sup>11</sup>, injunction<sup>12</sup>, consideration<sup>13</sup>, undue influence<sup>14</sup> and more recently the notion of unconscionable bargains<sup>15</sup>. More importantly, when the courts do so, they seem to look more at the intention of the parties rather than the pure contractual form<sup>16</sup>. Further, using certain rules of construction, the courts have seriously interfered with the express terms of contracts as regards exclusion and exemption clauses<sup>17</sup>. The courts have also interfered by way of the classification of terms<sup>18</sup>.

1 See eg *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, DC, where, although the court thought that the seller's signed order form was 'in regrettably small print', it did not interfere with its express terms. See also *Arcos Ltd v EA Ronaasen & Sons Ltd* [1933] AC 470, HL; *Interfoto Picture Library Ltd v Stilleto Visual Programme Ltd* [1989] 1 QB 433, [1988] 1 All ER 348, CA, per Bingham LJ; *Walford v Miles* [1992] 2 AC 128 at 137-138, [1992] 1 All ER 453 at 460, HL, per Lord Ackner; and Neill (1992) 108 LQR 405). In *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 at 802, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952 at 1013, CA (affd on other grounds sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1991] 2 AC 249, [1990] 2 All ER 947, HL), Slade LJ said 'the law cannot police the fairness of every commercial contract by reference to moral principles'; and see *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1990] 1 QB 818 at 897-898, [1989] 3 All ER 628 at 667, CA, per May LJ (revsd [1992] 1 AC 233, [1991] 3 All ER 1, HL); cf *Philips Electronics Grand Public SA v British Satellite Broadcasting Ltd* (1995) EMLR 472, CA; *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway* (1996) 49 ConLR 1, 78 BLR 42, CA.

2 See para 836 et seq post.

3 See para 630 post.

4 See paras 703-708 post.

5 See paras 710-711 post.

6 See para 987 post. As to contracts uberrimae fidei see para 701 note 8 post.

7 See *Ingham v Emes* [1955] 2 QB 366, [1955] 2 All ER 740, CA; and paras 778-789 post.

8 See paras 909-919 post.

9 See eg *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, HL (recording contract unbalanced to the detriment of the composer; contract held to be unfair because the publisher undertook minimal obligations whilst the composer gave a total commitment). As to contracts in restraint of trade see para 866 post; and COMPETITION vol 18 (2009) PARA 277 et seq. Such reasoning seems close to the French duty of loyalty as the court prevented one party from turning the contract solely to his advantage: see further para 612 note 8 ante.

10 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, HL. See further ESTOPPEL.

11 See paras 760, 1012 post; and SPECIFIC PERFORMANCE.

12 See paras 981, 1012 post; and CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.



13 See paras 727-747 post. This may explain the benefit in fact as consideration doctrine: see para 747 post.

14 See paras 712-715 post.

15 See para 716 post. But see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 3 All ER 297, HL, reversing an award of specific performance by the Court of Appeal.

16 This seems close to the techniques of interpretation used by the French courts when they impose extra duties in the name of good faith: see para 612 note 8 ante.

17 The courts have made the validity of such clauses dependent on certain rules, such as notice of incorporation and their clarity: see para 800 et seq post. See also the rules of interpretation, eg para 774 note 13 post.

18 See para 995 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(2) GOOD FAITH/614. The civil law notion of good faith as imported into English statute law.

#### **614. The civil law notion of good faith as imported into English statute law.**

There are a few instances where English statute law has imported the civil law notion of good faith directly into English common law, the instances mainly arising through the European Union. For example, European notions of good faith impact on international sales of goods by way of treaties. This was first seen under the Uniform Law of International Sales Act 1967<sup>1</sup> and later under the Commercial Agents (Council Directive) Regulations 1993<sup>2</sup>. Although not yet incorporated into English law, there are also the Vienna Convention on International Sales Law 1980<sup>3</sup> and the Unidroit General Principles of International Commercial Contracts 1994<sup>4</sup>.

The Unfair Terms in Consumer Contracts Regulations 1994<sup>5</sup> import good faith into certain classes of English contracts. Indeed, the regulations stipulate that a term is unfair if 'contrary to the requirement of good faith, it causes an imbalance between the parties' rights and obligations arising under the contract to the detriment of the consumer'<sup>6</sup>. Particularly as English law does not have an express general requirement of good faith<sup>7</sup>, understanding of this provision may be supplemented by looking at the preamble of the directive on which the regulations are based<sup>8</sup>. Although these regulations are very important in terms of consumer protection, the impact of the requirement of good faith is limited because it only applies at the stage of formation of consumer contracts<sup>9</sup>.

In the context of commercial agency<sup>10</sup>, the civil law notion of good faith has recently been applied in the Court of Appeal<sup>11</sup>.

1 See para 684 post.

2 See the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053 (as amended), implementing EC Council Directive 86/653 (OJ L382, 31.12.86, p 17).

3 The United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) done at Vienna, 11 April 1980; Misc 24 (1980); Cmnd 8074, stipulates that 'in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade law': see art 7(1); and see further para 684 post. Good faith is only used at the later stage of enforcement (for interpretation purposes) and the Convention can be excluded in total or in part: see art 6.

4 Several clauses of the Unidroit General Principles of International Commercial Contracts, made in Rome, May 1994, are committed to principles of good faith and co-operation; eg art 1.7(1) stipulates that 'the parties are bound by the requirement of good faith in international commerce'; and it is not possible to contract out of such a requirement: see art 1.7(2). These principles are not designed to be incorporated into national law. Nevertheless, they may be used by international arbitrators in international disputes.

5 The Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (see para 790 et seq post) implement EC Council Directive 93/13 (OJ L95, 21.4.93, p 29).

6 The Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(1) corresponds word for word to EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) art 3(1).

7 See para 613 ante.

8 EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) preamble stipulates that 'whereas the assessment, according to general criteria chosen, of the unfair character of terms in particular sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas in making an assessment of good faith, particular regard must be had to the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of

good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

9 Good faith is used as a means to define what an unfair term is: see further para 790 et seq post.

10 See note 2 supra.

11 See *Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656, CA. The case was interlocutory, so that the interpretation is not conclusive. Nevertheless, the court interfered with the terms of the contract in order to establish a more equitable outcome. Indeed, the court expressly referred to and applied the continental notion of good faith in interpreting a clause in the contract in such a manner as to prevent one party from taking advantage of the contract for his sole benefit. As such, the court departed from the English common law tradition of leaving it to the discretion of the parties as to the way in which the contract was performed (see para 925 post).

## **UPDATE**

### **614 The civil law notion of good faith as imported into English statute law**

NOTE 2--As to the duty of national courts to interpret national law in conformity with EC Council Directive 86/653, see Case C-456/98 *Centrosteeel Srl v Adipol GmbH* [2000] 3 CMLR 711, ECJ.

NOTES 5, 6--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(3) CLASSIFICATIONS/615. Classes of contracts.

### **(3) CLASSIFICATIONS**

#### **615. Classes of contracts.**

Contracts have been divided, according to the mode of their formation, into three classes: (1) contracts of record; (2) contracts made by deed; and (3) simple contracts<sup>1</sup>. Contracts of record, however, are not contracts in the sense in which that term is here employed but are judgments and recognisances which are enrolled in the record of the proceedings of a court of record, and in law imply a debt though the obligation arises from the entry on the record and not from any agreement between the parties<sup>2</sup>. Leaving aside contracts of record, all contracts may be divided into contracts made by deed and simple contracts<sup>3</sup>.

1 2 Bl Com 464-465.

2 As to recognisances see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1165 et seq; and as to judgments generally see CIVIL PROCEDURE vol 12 (2009) PARA 1136 et seq; CIVIL PROCEDURE vol 12 (2009) PARA 1168 et seq. As to courts of record see COURTS.

3 'Nor is there any such third class ... as contracts in writing': *Rann v Hughes* (1778) 7 Term Rep 350n, HL.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(3) CLASSIFICATIONS/616. Contracts made by deed.

## **616. Contracts made by deed.**

At common law, contracts by deed (specialties) were made under seal<sup>1</sup>, though not all deeds amounted to specialties<sup>2</sup>. The separate promises made in such a contract are frequently termed covenants<sup>3</sup>.

The general common law rule was that to be effective, a deed had to be: (1) written on paper or parchment; (2) sealed; and (3) delivered<sup>4</sup>. However, these rules have been amended by statute, so that there are now three classes of contract made by deed.

In 1925, there was added the requirement that a deed must be signed by the maker<sup>5</sup>: after that, it was usually said that a deed made by an individual must be signed, sealed and delivered. For deeds made by an individual on or after 31 July 1990<sup>6</sup>, statute has abolished any rule of law which (a) restricts the substance on which a deed may be written<sup>7</sup>; or (b) requires a seal for a valid execution of an instrument as a deed<sup>8</sup>; or (c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed<sup>9</sup>. Instead, such a deed must make clear on its face that it is intended to be a deed by the parties to it, whether by describing itself as a deed or otherwise<sup>10</sup>; and it must also be validly executed (usually by signature) by those persons<sup>11</sup>.

For deeds made by a registered company on or after 31 July 1990<sup>12</sup>, the position as to the making of a deed by a registered company is assimilated to that above of an individual making a deed, whether the company has a common seal<sup>13</sup> or not<sup>14</sup>.

The category of deeds made by other persons will include deeds made by corporations sole<sup>15</sup> and aggregate<sup>16</sup>, whose execution of a deed essentially follows the old common law rules as to signing, sealing and delivering of a deed<sup>17</sup>.

1 As to deeds generally see DEEDS AND OTHER INSTRUMENTS. As to those contracts which must be made by deed see para 621 post; and as to the time when such a contract takes effect see para 685 post.

2 Eg a company's memorandum or share certificate (see COMPANIES); or probate of a will (see WILLS).

3 See generally DEEDS AND OTHER INSTRUMENTS; LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 132 et seq; SALE OF LAND.

4 *Goddard's Case* (1584) 2 Co Rep 4b at 5a; and see DEEDS AND OTHER INSTRUMENTS.

5 See now the Law of Property (Miscellaneous Provisions) Act 1989 s 4, Sch 2 (repealing the Law of Property Act 1925 s 73).

6 See the Law of Property (Miscellaneous Provisions) Act 1989 (Commencement) Order 1990, SI 1990/1175. Instruments delivered as deeds before this date remain governed by the previous law: Law of Property (Miscellaneous Provisions) Act 1989 s 1(11).

7 See *ibid* s 1(1)(a). However, writing is still required (see note 4 *supra*).

8 *Ibid* s 1(1)(b).

9 *Ibid* s 1(1)(c). This abolishes the rule that where a party to a deed (P) gave another authority to deliver a deed on P's behalf, that authority had to be given by deed. As to deeds delivered by a solicitor see s 1(5) (amended by the Courts and Legal Services Act 1990 s 125(2), Sch 17, para 20). See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 247 et seq.

10 Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(a). This will usually be satisfied by the instrument describing itself as a deed.

11 Ibid s 1(2)(b). As to execution of such a deed by signature see s 1(3), (4). See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 8, 33.

12 See note 6 supra.

13 See the Companies Act 1985 s 36A(2) (added by the Companies Act 1989 s 130(2)).

14 See the Companies Act 1985 s 36A(3)-(5) (added by the Companies Act 1989 s 130(2)). For many years previously, it has been provided by statute that a contract which, if made between private persons would by law be required to be in writing under seal, might be made on behalf of a company registered under the Companies Acts in writing under the common seal of the company. See the Companies Act 1908 s 76 (repealed; replaced by the Companies Act 1929 s 29 (repealed; itself replaced by the Companies Act 1948 s 32(1)(a) (repealed)). The Companies Act 1948 s 32(1)(a) was replaced by the Companies Act 1985 s 36(1)(a) (now substituted by the Companies Act 1989 s 130(1)).

15 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(10); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 32; CORPORATIONS vol 9(2) (2006 Reissue) para 1122.

16 See generally CORPORATIONS.

17 See *First National Securities Ltd v Jones* [1978] Ch 109, [1978] 2 All ER 221, CA; and CORPORATIONS vol 9(2) (2006 Reissue) para 1123.

## UPDATE

### 616 Contracts made by deed

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTES 9, 11--Law of Property (Miscellaneous Provisions) Act 1989 s 1(3), (4) amended, s 1(5) further amended: Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906.

TEXT AND NOTE 10--An instrument is not to be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal: Law of Property (Miscellaneous Provisions) Act 1989 s 1(2A) (added by SI 2005/1906).

TEXT AND NOTE 11--For 'by those persons' read 'by one or more of those persons or a person authorised to execute it in the name or on behalf of one or more of those persons': Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(b) (amended by SI 2005/1906).

TEXT AND NOTES 13, 14--1985 Act s 36A replaced by Companies Act 2006 s 44: see COMPANIES vol 14 (2009) PARA 288.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(3) CLASSIFICATIONS/617. Incidents of contract made by deed.

### **617. Incidents of contract made by deed.**

When a deed is expressed to be made between several parties, it will generally take effect against every person who has executed it even though another party to it has not executed it<sup>1</sup>. Thus, the covenants in a contract made by deed may be enforced by any person named in the deed as a party to it against any party executing that deed, notwithstanding that the former has neither executed it<sup>2</sup>, nor expressed his assent to it<sup>3</sup>, and notwithstanding that the deed contains cross-covenants on the part of the former which provide the consideration for the covenants with him<sup>4</sup>. Furthermore, a contract made by deed has the following incidents:

- 1 (1) the fundamental difference between contracts made by deed and simple contracts lies in the doctrine of consideration<sup>5</sup>. The ordinary rule is that the law will enforce an executory promise given for consideration<sup>6</sup>, but not an imperfect gift<sup>7</sup>. A promise made by deed, however, derives its validity from its form alone; it is regarded as binding at common law even without consideration<sup>8</sup>, except where void, for example as being in restraint of trade<sup>9</sup>, or illegal<sup>10</sup>. Equity, however, has always refused to aid the enforcement of contracts made by deed without consideration<sup>11</sup>;
- 2 (2) where a debtor enters into a covenant contained in a deed to secure a debt which is already owing by him under a simple contract, the remedy on the simple contract is in general merged in the superior remedy on the covenant and is extinguished in law<sup>12</sup>;
- 3 (3) in any action or proceedings based on the deed itself<sup>13</sup>, any unambiguous statements contained in that deed may operate by way of estoppel against the parties who made them<sup>14</sup>. Whether such statements are intended as admissions by all the parties or only some of them is a question of construction; if intended as admissions by all, all are estopped, but otherwise they only estop the parties whose statements they are intended to be<sup>15</sup>;
- 4 (4) at common law, the general rule in respect of contracts made by deed<sup>16</sup> was that nobody could sue upon a covenant contained therein which was expressed to be for his benefit unless named in that instrument as a party to it<sup>17</sup>. By statute<sup>18</sup>, however, a person may take an interest in land or other property<sup>19</sup>, or the benefit of any condition, covenant or agreement respecting land or other property, although not named as a party to the conveyance or other instrument; but despite the references to 'other property', 'agreement' and 'other instrument'<sup>20</sup>, the statute would appear<sup>21</sup> only to give a covenantee a right of action to enforce a covenant in respect of real property<sup>22</sup> found in an instrument made by deed to which the covenantee is a party (though not named as such)<sup>23</sup>;
- 5 (5) the period of limitation for an action for breach of contract is 12 years if the contract is made by deed<sup>24</sup>, but only six years in the case of a simple contract<sup>25</sup>;
- 6 (6) whilst the common law generally would not allow a contract made by deed to be varied or discharged by a simple contract, equity would do so<sup>26</sup>;
- 7 (7) where a party was induced to execute a deed by a mistake as to its contents, there was an ancient common law defence known as non est factum. In the nineteenth century this principle was applied to all kinds of contracts<sup>27</sup>.

1 *Lady Naas v Westminster Bank Ltd* [1940] AC 366 at 374-375, [1940] All ER 485 at 488-489, HL, per Viscount Maugham; and see generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 57.

- 2 *Exton v Scott* (1833) 6 Sim 31; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 62.
- 3 *Xenos v Wickham* (1866) LR 2 HL 296; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 62.
- 4 *Morgan v Pike* (1854) 14 CB 473; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 64.
- 5 This is because the history of contracts under seal lay, not in the action of assumpsit, but in the action of covenant, or, more commonly, upon a bond: see para 602 note 1 ante.
- 6 See para 727 post.
- 7 *Milroy v Lord* (1862) 4 De G F & J 264, CA in Ch; and see GIFTS vol 52 (2009) PARA 267.
- 8 *Morley v Boothby* (1825) 3 Bing 107 at 111-112 per Best CJ. But it is still subject to the ordinary rules in respect of void and illegal contracts: see para 836 et seq post, and particularly para 857 note 8 post.
- 9 A contract in restraint of trade will not be enforced unless supported by consideration, regardless of whether it is made by deed (*Mitchel v Reynolds* (1711) 1 P Wms 181) and in any event will be enforced only in certain circumstances. As to when a contract in restraint of trade may be enforced see COMPETITION vol 18 (2009) PARA 277 et seq.
- 10 As to void and illegal contracts see para 836 et seq post.
- 11 *Ellison v Ellison* (1802) 6 Ves 656 at 662 per Lord Eldon LC; and see further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 59; SPECIFIC PERFORMANCE; TRUSTS vol 48 (2007 Reissue) para 662.
- 12 See para 1062 post.
- 13 But not in any collateral action or proceedings: *Carter v Carter* (1857) 3 K & J 617; *Fraser v Pendlebury* (1861) 31 LJCP 1.
- 14 *Duchess of Kingston's Case* (1776) 20 State Tr 355 (see 2 Smith LC (13th Edn) 644 at 754 et seq); *Bowman v Taylor* (1834) 2 Ad & El 278; *Carter v Carter* (1857) 3 K & J 617. But this doctrine is not to be extended: *General Finance Mortgage and Discount Co v Liberator Permanent Benefit Building Society* (1878) 10 ChD 15 at 24 per Jessel MR. As to estoppel by deed generally see ESTOPPEL. A person who is sued on a contract made by deed is not precluded from setting up the following defences: non est factum (see note 27 infra); that the contract is void or illegal (see para 836 et seq post); incapacity (see para 630 post).
- 15 *Stroughill v Buck* (1850) 14 QB 781; and see further ESTOPPEL.
- 16 This rule is confined to deeds inter partes: *Scudamore v Vanderstene* (1587) 2 Co Inst 673; *Chelsea and Walham Green Building Society v Armstrong* [1951] Ch 853, [1951] 2 All ER 250; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 61, 62.
- 17 *Windsore v Hobart* (1585) Hob 313; and see further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 61. As to contracts made by deed executed by an agent in his own name see AGENCY vol 1 (2008) PARAS 15, 45, 127.
- 18 Law of Property Act 1925 s 56(1). See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 61.
- 19 'Property' includes anything in action, and any interest in real or personal property: *ibid* s 205(1)(xx). As to execution under a power of attorney see the Powers of Attorney Act 1971 s 7; and see further AGENCY vol 1 (2008) PARA 16; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 157.
- 20 It was at one time suggested, on the basis of the inclusion of these words in the Law of Property Act 1925 s 56(1), that this provision might embody a general exception to the doctrine of privity (see the view expressed by Lord Denning MR in *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 515, [1949] 2 All ER 179 at 188, CA; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 at 275, [1953] 2 All ER 1475 at 1483, CA; *Beswick v Beswick* [1966] Ch 538 at 556, [1966] 3 All ER 1 at 9, CA (affd on other grounds see para 749 post)); but it now appears that this is not so: see the text and notes 21-23 infra.
- 21 See *Beswick v Beswick* [1968] AC 58 at 73, 76, [1967] 2 All ER 1197 at 1202, 1204, HL, per Lord Reid, at 79-81 and 1206-1207 per Lord Hodson, at 85-87 and 1202-1211 per Lord Guest, at 93-94 and 1215-1216 per Lord Pearce and at 105-106 and 1223-1224 per Lord Upjohn; it would seem that their Lordships' views on the Law of Property Act 1925 s 56 are all obiter.



22 *Beswick v Beswick* [1968] AC 58 at 87, [1967] 2 All ER 1197 at 1211, HL, per Lord Guest and at 76-77 and 1204 per Lord Reid, contra at 105 and 1223 per Lord Upjohn; *Southern Water Authority v Carey* [1985] 2 All ER 1077. Presumably by 'real property' is meant 'land', which thereby includes leases.

23 *Beswick v Beswick* [1968] AC 58 at 104-106, [1967] 2 All ER 1197 at 1222-1224, HL, per Lord Upjohn. This view was accepted at 76 and at 1204 per Lord Reid, and at 94 and 1216 per Lord Pearce. See further *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 2 All ER 990, [1997] 1 WLR 1025; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 61; LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 554; SALE OF LAND.

24 See the Limitation Act 1980 s 8; and LIMITATION PERIODS vol 68 (2008) PARA 975.

25 See *ibid* s 5; and LIMITATION PERIODS vol 68 (2008) PARA 956.

26 See paras 1019-1024 post.

27 See 8 Holdsworth's History of English Law (2nd Edn) 50-51. As to the plea in relation to deeds see *Saunders v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 69-73. In relation to simple contracts see para 687 post.

## UPDATE

### 617 Incidents of contract made by deed

NOTE 19--1971 Act s 7 amended: Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906. See further AGENCY vol 1 (2008) PARA 45.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(3) CLASSIFICATIONS/618. Simple contracts.

### **618. Simple contracts.**

Simple contracts include all contracts which are not contracts of record or contracts made by deed. Simple contracts may be express or implied, or partly express and partly implied. Contracts are express to the extent that their terms are set out distinctly either by word of mouth or in writing<sup>1</sup>. They are implied<sup>2</sup> to the extent, if any, to which their terms are a necessary inference from the words or conduct of the parties<sup>3</sup>.

Express contracts may, of course, besides the terms which are expressed contain additional terms which are implied; and in that case they are partly express and partly implied. But any implication either as to the existence, or as to the terms, of a contract, must be founded on the intention of the parties as evinced by their words or conduct. It follows that at common law there can be no implication of terms inconsistent with the expressed intention of the parties on the principle *expressum facit cessare tacitum*<sup>4</sup>; and, when the express terms of a contract are such as to be unenforceable, on the same principle it is impossible to imply an enforceable contract inconsistent with those terms<sup>5</sup>. By contrast, statute can cause terms which have not been agreed to be implied in a contract, and may, and in fact often does, provide that such terms may be implied notwithstanding any agreement to the contrary<sup>6</sup>.

Where there is an express or implied request by the defendant for services to be rendered to him by the plaintiff, it may be possible to imply a contract under which the defendant promises to pay quantum meruit for those services<sup>7</sup>, though this may not be done so as to contradict an express contract between the parties<sup>8</sup>. For instance, the employment of a person in a professional capacity raises a rebuttable presumption that he is to be paid for those services<sup>9</sup>; and, where the plaintiff voluntarily does work for the benefit of the defendant's property, the defendant may adopt the benefit of it in such a way as to give rise to the inference of a contract to pay<sup>10</sup>.

In some cases a contract is said to be implied by law. Such an implied contract is really an obligation imposed by law independently of an actual agreement between the parties<sup>11</sup>, and may be imposed notwithstanding an expressed intention by one of the parties to the contrary<sup>12</sup>. It is not a contract in the true sense of the term at all, but an obligation of the class formerly known as quasi contract, a term derived from the civil law systems, and now falling within the law of restitution<sup>13</sup>.

1 In certain cases contracts are required by law to be made in writing (see para 623 post); but these are none the less simple contracts, for they derive no efficacy from their form and are not binding unless there is consideration: *Rann v Hughes* (1778) 7 Term Rep 350n, HL. As to simple contracts see further paras 615-617 ante.

2 *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA. As to implied agency see *Little v Spreadbury* [1910] 2 KB 658; and AGENCY vol 1 (2008) PARAS 14, 25.

3 *Re Chappell, ex p Ford* (1885) 16 QBD 305, CA; *Nicol v Hennessey* (1896) 44 WR 584; *The Satanita* [1897] AC 59, HL; *British Bank for Foreign Trade Ltd v Novinex Ltd* [1949] 1 KB 623, [1949] 1 All ER 155, CA; *Harrods Ltd v Harrods (Buenos Aires) Ltd* (1998) Times, 1 June, CA. Such contracts are often said to be 'implied in fact' to distinguish them from contracts 'implied in law': see the text and note 7 infra.

4 In the case where the terms are express nothing else can be implied: *Cotter v Merrick* (1657) Hard 89; *Clarke v Samson* (1748) 1 Ves Sen 100; *Aspdin v Austin* (1844) 5 QB 671; *Abbott v Bates* (1875) 45 LJQB 117, CA; *Britain v Rossiter* (1879) 11 QBD 123, CA; *Forman & Co Pty Ltd v The Liddesdale* [1900] AC 190, PC; *Ellis v Glover and Hobson Ltd* [1908] 1 KB 388, CA; and see DEEDS AND OTHER INSTRUMENTS. See also para 922 post (the rule of entire contracts).

5 See the text and note 8 *infra*. See also para 783 note 9 post.

6 See eg the Sale of Goods Act 1979 ss 12-15 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES. Such terms may sometimes be made compulsory by the Unfair Contract Terms Act 1977: see para 820 *et seq* post.

7 *Way v Latilla* [1937] 3 All ER 759, 81 Sol Jo 786, HL; *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504. As to implied contracts see also paras 618 ante, 778 note 3, 787 note 13, 1014 note 9 post. As to claims of quantum meruit and quantum valebat see RESTITUTION vol 40(1) (2007 Reissue) para 113 *et seq*.

8 *Britain v Rossiter* (1879) 11 QBD 123, CA; *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099, CA; *Morrison-Knudsen Co Inc v British Columbia Hydro and Power Authority* (1978) 85 DLR (3d) 186, BC CA.

9 See AGENCY vol 1 (2008) PARA 101 *et seq* (implied contracts; and estate agent's commission). This principle does not apply in the case of the work done by a barrister within the scope of his practice (see LEGAL PROFESSIONS vol 66 (2009) PARA 1146), or in the case of services rendered by directors of a company in that capacity (see COMPANIES vol 14 (2009) PARA 478 *et seq*), or in the case of work done by a public officer in his official capacity under a statutory obligation (*Jones v Carmarthen Corpn* (1841) 8 M & W 605. An officer appointed by a local authority under the Local Government Act 1972 s 112(1) holds office on such reasonable terms and conditions, including conditions as to remuneration, as the authority thinks fit: see s 112(2); and LOCAL GOVERNMENT vol 69 (2009) PARA 425).

10 *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA; and see *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 at 543, 545, [1936] 3 All ER 696 at 706-707, CA, per Lord Wright MR; *Lachhani v Destination Canada (UK) Ltd* (1997) 13 Const LJ 279.

11 The expression 'implied contract' has been used to describe both contracts implied in fact (see note 7 *supra*) and contracts implied in law. This has been a source of great confusion (see eg *Upton-on-Severn RDC v Powell* [1942] 1 All ER 220, CA); and has arisen from the use of the action of *assumpsit* in both situations. It has been said that such a claim is truly quasi-contractual (*William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712 at 717, [1957] 1 WLR 932 at 936 per Barry J), in which case it would now fall within the law of restitution (see RESTITUTION). See also para 787 post.

12 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 27-29, [1940] 4 All ER 20 at 35-37, HL, per Lord Atkin. It is otherwise where there is an expressed intention by all the contracting parties: *Cutter v Powell* (1795) 6 Term Rep 320; and see para 922 post (the rule of entire contracts).

13 Restitution is considered in RESTITUTION.

## UPDATE

### 618-619 Simple contracts ... Particular types of contract

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 618 Simple contracts

NOTE 3--A longstanding commercial relationship between parties who had not entered into an express contract does not remove the requirement of necessity in order to give rise to an implied contract: *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737. The terms of an oral contract may be inferred from the parties' conduct after the formation of contract: *Maggs v Marsh* [2006] EWCA Civ 1058, [2006] BLR 395.

NOTES 7, 8--See *Robert Barry & Co v Doyle* 1998 SLT 1238, OH.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/1. INTRODUCTION/(3) CLASSIFICATIONS/619. Particular types of contract.

### **619. Particular types of contract.**

Contracts may be further classified by reference to their particular subject matter, such as contracts of agency, bailment, sale or service<sup>1</sup>. These and other particular types of contract<sup>2</sup> are dealt with in the titles relating to their subject matter, where the incidents of each particular type are considered; but all are prima facie subject to the general principles which govern all contracts<sup>3</sup>.

Where, however, the incidents of two different types of contract differ it may be important to determine into which category a particular case falls. Sometimes this may be a difficult matter, and it has, for example, proved difficult to determine the borderline between the following different types of contract: of employment or for work and labour<sup>4</sup>; of agency or for work and labour<sup>5</sup>; of guarantee or indemnity<sup>6</sup>; of sale or agency<sup>7</sup>; of sale of goods or work and labour<sup>8</sup>. However, in some circumstances a statutory solution has been provided<sup>9</sup>.

1 See generally AGENCY; BAILMENT; EMPLOYMENT; SALE OF GOODS AND SUPPLY OF SERVICES; SALE OF LAND. As to television contracts see TELECOMMUNICATIONS AND BROADCASTING.

2 As to contracts to leave property by will see the Inheritance (Provision for Family and Dependants) Act 1975 s 11; and EXECUTORS AND ADMINISTRATORS. As to contracts made by the Crown see *Quintessence Co-Ordinators (Pty) Ltd v Government of the Republic of Transkei* 1993 (3) SA 184, Transkei GD; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 387.

3 Because in English law all actions in respect of simple contracts might be brought in assumpsit: see para 602 note 1 ante.

4 See *Sadler v Henlock* (1855) 4 E & B 570; and EMPLOYMENT vol 39 (2009) PARA 4.

5 See AGENCY vol 1 (2008) PARA 1 et seq.

6 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1013, 1255.

7 See eg AGENCY vol 1 (2008) PARA 1 et seq; *Weiner v Harris* [1910] 1 KB 285, CA; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 29, 120; *Nash v Dix* (1898) 78 LT 445; and SALE OF LAND.

8 See BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 1; and *Lee v Griffin* (1861) 1 B & S 272; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 3.

9 See the Supply of Goods and Services Act 1982 ss 1, 2, the scope of which includes part-exchanges and some 'free gifts'; and SALE OF GOODS AND SUPPLY OF SERVICES.

## **UPDATE**

### **618-619 Simple contracts ... Particular types of contract**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(1) IN GENERAL/620. General rule.

## 2. FORM AND FORMALITIES

### (1) IN GENERAL

#### 620. General rule.

In the ordinary case, the law does not require a contract to be made in any particular form, nor according to any particular formalities; it is sufficient that there be a simple contract<sup>1</sup>. Such a contract may be validly made either orally<sup>2</sup> or in writing<sup>3</sup>, or partly orally and partly in writing<sup>4</sup>. If it is in writing, a contract may be under hand only or by deed; but the law requires writing in the case of certain contracts<sup>5</sup>, and some of these must be in the form of a deed<sup>6</sup>.

The term 'parol contract' is sometimes applied to simple contracts, whether oral or written, as distinguished from contracts by deed, and sometimes to oral as distinguished from written contracts. It is more properly used in the former sense<sup>7</sup>.

1 As to simple contracts generally see para 618 ante.

2 See eg *Smith v Hughes*(1871) LR 6 QB 597; *Phillips v Brooks Ltd*[1919] 2 KB 243; *Luxor (Eastbourne) Ltd v Cooper*[1941] AC 108, [1941] 1 All ER 33, HL; *Errington v Errington and Woods*[1952] 1 KB 290, [1952] 1 All ER 149, CA; *McCutcheon v David MacBrayne Ltd*[1964] 1 All ER 430, [1964] 1 WLR 125, HL; *Lewis v Averay*[1972] 1 QB 198, [1971] 3 All ER 907, CA; *Hollier v Rambler Motors (AMC) Ltd*[1972] 2 QB 71, [1972] 1 All ER 399, CA. See also the cases on oral variation of a written contract cited in para 1024 post.

3 In the context of this phrase, the term 'orally' should be taken to include all communications made other than in writing, ie by word of mouth or by conduct or both: see para 618 ante.

4 See eg *Transmotors Ltd v Robertson, Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224; *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd*[1976] 2 All ER 930, [1976] 1 WLR 1078, CA. For cases where a written exclusion clause was imported into an oral contract see also para 801 post.

5 See para 623 post.

6 See para 621 post. As to contracts by deed generally see paras 616-617 ante.

7 As to the parol evidence rule see para 622 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(1) IN GENERAL/621. Contracts required to be made by deed.

### **621. Contracts required to be made by deed.**

Since 1960<sup>1</sup>, the only contracts which are required by the rules of common law to be made by deed are contracts made without valuable consideration<sup>2</sup>. However, particular statutes require contractual documents to be made by deed in, inter alia, the following cases<sup>3</sup>: most conveyances of land or of any interest in land<sup>4</sup>; transfers of shares in certain companies<sup>5</sup>; and transfers of a British ship or of a share in one<sup>6</sup>.

1 The requirement that some contracts with corporations be under seal was removed by the Corporate Bodies' Contracts Act 1960 s 1; and see CORPORATIONS vol 9(2) (2006 Reissue) para 1272.

2 As to the nature of valuable consideration see paras 727-747 post.

3 See DEEDS AND OTHER INSTRUMENTS, where the cases in which a deed is necessary are exhaustively dealt with.

4 See the Law of Property Act 1925 s 52; and para 624 post. For the meaning of 'conveyance' see s 205(1) (ii); and for the meaning of 'land' see s 205(1)(ix); and REAL PROPERTY.

5 See in the case of a company within the Companies Clauses Consolidation Act 1845 s 14: see COMPANIES vol 15 (2009) PARA 1716.

6 See the Merchant Shipping Act 1995 s 16, Sch 1 para 2(1); and SHIPPING AND MARITIME LAW vol 93 (2008) PARAS 306, 307.

### **UPDATE**

### **621 Contracts required to be made by deed**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(1) IN GENERAL/622. Written terms and written contracts.

## **622. Written terms and written contracts.**

Contracts wholly or partly in writing and not made by deed do not differ in principle from oral contracts<sup>1</sup>; their meaning is a question of construction, and therefore of law, to be ascertained in the light of the language used in the context of all the relevant surrounding circumstances<sup>2</sup>. Where the product of the negotiations between the parties is a written document, that writing may accurately<sup>3</sup> record the whole of the matter agreed by them, either expressly<sup>4</sup> or by reference<sup>5</sup>. Alternatively, a party may sometimes wish to argue that that written record should be supplemented by extrinsic evidence, which may be desired to import additional terms or to explain or interpret some of the written terms.

Where the intention of the parties has in fact<sup>6</sup> been reduced to writing<sup>7</sup>, under the so-called 'parol evidence rule' it is generally<sup>8</sup> not permissible to adduce extrinsic evidence<sup>9</sup>, whether oral or written, either to show that intention, or to contradict, vary or add to the terms of the document<sup>10</sup>, including implied terms<sup>11</sup>. This rule is not confined to oral (parol) evidence, but also excludes earlier<sup>12</sup> extrinsic written matter, such as earlier drafts<sup>13</sup>, preliminary agreements<sup>14</sup> and prior correspondence<sup>15</sup>. It has been said that the parol evidence rule merely embodies a strong presumption that an apparent written record of a contract is intended to contain all the terms of their bargain, but that extrinsic evidence may be allowed to show that the writing is not intended to express the entire agreement between the parties<sup>16</sup>. Where the latter situation obtains, the effect is that the courts are saying that the bargain is embodied partly in the document and partly in the parol evidence<sup>17</sup>, as where a documentary stipulation for payment on a certain day was read in the light of parol evidence as allowing payment to be deferred<sup>18</sup>, or in respect of the capacity in which a party appears in a document<sup>19</sup>. Thus, the parol evidence rule only applies where the parties to an agreement reduce it to writing and agree or intend that the writing shall be their only agreement<sup>20</sup>: a court will then exclude parol evidence because it is irrelevant<sup>21</sup>; and this may be the effect of 'entire agreement clauses' acknowledging that the writing expresses the entire agreement between the parties<sup>22</sup>. Moreover, the subsequent conduct of the parties is inadmissible to interpret a written contract<sup>23</sup> but it is admissible to show whether or not the parties have yet finished agreeing<sup>24</sup>.

The cases where parol evidence is admitted are traditionally termed 'exceptions to the parol evidence rule', but may simply be seen as cases falling outside the rule<sup>25</sup>.

1 See para 618 note 1 ante. As to the formation of written contracts see para 686 post; as to the incorporation of written terms in oral contracts see para 688 post; and as to standard form contracts see para 771 post.

2 As to the construction of written contracts see para 772 et seq post.

3 If that writing does not accurately record their prior oral agreement, it may be rectified by the court so as to do so. As to rectification see para 896 post.

4 As to express terms see para 770 post.

5 As to the incorporation of terms by reference see para 688 post.

6 This is regardless of whether or not the law requires the contract to be reduced to, or evidenced in, writing, as to which see paras 623-625 post.

7 It has been held that a computer data base which formed part of the business records of a company was, so far as it contained information capable of being retrieved and converted into readable form, a 'document' for

the purposes of RSC Ord 24 and therefore susceptible to discovery: *Derby & Co Ltd v Weldon (No 9)* [1991] 2 All ER 901, [1991] 1 WLR 652.

8 The rule is not enforced where the court is asked to grant a discretionary remedy, such as rectification or rescission on grounds of mistake, or specific performance: see para 690-700 notes 26-27 post.

9 Distinguish intrinsic evidence used to interpret written contracts: see para 772 post.

10 *Goss v Lord Nugent* (1833) 5 B & Ad 58 at 64; *Prenn v Simmonds* [1971] 3 All ER 237 at 240, [1971] 1 WLR 1381 at 1384, HL, per Lord Wilberforce; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185.

11 *Burges v Wickham* (1863) 3 B & S 669 at 696-697 per Blackburn J; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 188. The parol evidence rule might nowadays be seen in terms of good faith: see para 613 ante.

12 This is because instruments are to be construed at the time of their execution: *Balfour v Welland* (1809) 16 Ves 151 at 156; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 187. Subsequent agreements can only take effect under the rules discussed later: see para 1013 et seq post. As to subsequent conduct see note 23 infra.

13 *Miller v Travers* (1832) 8 Bing 244; *Inglis v John Buttery & Co* (1878) 3 App Cas 552, HL; *National Bank of Australasia v Falkingham & Sons* [1902] AC 585, PC.

14 *Evans v Roe* (1872) LR 7 CP 138; *Henderson v Arthur* [1907] 1 KB 10, CA; *Newman v Gatti* (1907) 24 TLR 18, CA; *Hitchings & Coulthurst Co v Northern Leather Co of America and Doushkess* [1914] 3 KB 907; *Hutton v Watling* [1948] Ch 398, [1948] 1 All ER 803, CA; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127, CA; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185.

15 *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC. Distinguish contracts made by correspondence: see para 668 post.

16 See *Gillespie Bros & Co v Cheney, Eggar & Co* [1896] 2 QB 59 at 62 per Lord Russell CJ: '...[W]hen the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement'.

17 *Harris v Rickett* (1859) 4 H & N 1; *Malpas v London and South Western Rly Co* (1866) LR 1 CP 336; *Gillespie Bros v Cheney Eggar & Co* [1896] 2 QB 59; *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA.

18 *Young v Austen* (1869) LR 4 CP 553; *Maillard v Page* (1870) LR 5 Exch 312.

19 Eg that a person appearing as principal was in fact an agent and vice versa: see DEEDS AND OTHER INSTRUMENTS.

20 *Harris v Rickett* (1859) 4 H & N 1 at 7 per Pollock CB. See also *Bell v Hobbs* [1956] NZLR 1005, NZ SC.

21 See generally CIVIL PROCEDURE vol 11 (2009) PARA 758 et seq.

22 *McGrath v Shah* (1989) 57 P & CR 452, DC. But contrast *Lowe v Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA; and the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4), Sch 3 para 1(n) (see para 794 post).

23 'Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later': *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603, [1970] 1 All ER 796 at 798, HL, per Lord Reid; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 206. But see *Manitoba Development Corp v Columbia Forest Products Ltd* (1974) 43 DLR (3d) 107, Man CA.

24 See paras 668 note 3, 675 note 4 post.

25 See para 690-700 post.

## UPDATE



## **622 Written terms and written contracts**

NOTE 7--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 10--See also *Freeguard v Rogers* [1999] 1 WLR 375, CA (when construing the identity of property which is the subject of an option to purchase agreement, the court may consider extrinsic evidence).

NOTE 22--See *Inntrepeneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 (entire agreement clause precluded party from setting up alleged collateral warranty); and *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 (Comm), [2004] 1 All ER (Comm) 435 (entire agreement clause excluded implied term based on usage or custom). As to the effect of an entire agreement clause on the scope of an exclusion clause, see *Watford Electronics v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696.

SI 1994/3159 reg 4(4), Sch 3 para 1(n) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 reg 5(5), Sch 2 para 1(n).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(2) CONTRACTS REQUIRED TO BE IN WRITING/623. Contracts where writing is required.

## **(2) CONTRACTS REQUIRED TO BE IN WRITING**

### **623. Contracts where writing is required.**

By statute, some contracts must be made by deed<sup>1</sup>; some can only be made in writing<sup>2</sup>; some must be evidenced in writing<sup>3</sup> and yet others merely require one party to give the other some written notice of specified terms of the contract<sup>4</sup>.

The absence of writing in these cases may have various effects. It may render the contract void<sup>5</sup>, or unenforceable<sup>6</sup>. In some cases, the absence of writing may involve one or more of the parties in criminal proceedings<sup>7</sup>. Statutory interpretation is considered elsewhere in this work<sup>8</sup>.

1 See para 621 ante.

2 Eg under the Consumer Credit Act 1974 s 61: see CONSUMER CREDIT para 160 ante. For other examples see para 625 post; and see eg para 624 post; and REAL PROPERTY; SALE OF LAND. For the differing rules concerning contracts required to be (1) in writing; or (2) evidenced in writing see para 626 post.

3 Eg a promise to answer for the debt, default or miscarriage of another person: see the Statute of Frauds (1677) s 4 (as amended); and see further para 1026 post.

4 See eg the Landlord and Tenant Act 1985 s 4 (rent book); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 253; the Employment Rights Act 1996 s 4 (written statement of terms of employment); and EMPLOYMENT vol 39 (2009) PARA 93 et seq. For other examples see para 625 post.

5 See eg the Law of Property Act 1925 s 52 ('void for the purpose of conveying or creating a legal estate'): see further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 14, 15; REAL PROPERTY. The distinction between void and unenforceable contracts is considered at para 607 ante.

6 For cases where the contract is unenforceable by any party see the examples cited in note 3 supra; and for cases where the contract is unenforceable by one party see eg the Consumer Credit Act 1974 s 65(1), which provides that the creditor or owner of the goods can only enforce a defective agreement with the permission of the court; and CONSUMER CREDIT para 169 ante. As to the progressive repeal of the Statute of Frauds (1677) see para 1025 note 17 post.

7 See eg the Unsolicited Goods and Services Act 1971 s 3(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 659. As to the civil consequences of failure to comply with such statutory requirements see generally paras 870-873 post.

8 As to the interpretation of statutes by English courts see generally STATUTES vol 44(1) (Reissue) para 1369 et seq.

## **UPDATE**

### **623 Contracts where writing is required**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(2) CONTRACTS REQUIRED TO BE IN WRITING/624. The sale of an interest in land.

## 624. The sale of an interest in land.

Replacing the previous rule in respect of subsequent transactions<sup>1</sup>, the Law of Property (Miscellaneous Provisions) Act 1989 provides a scheme for contracts for the sale or other disposition of an interest in land<sup>2</sup> made on or after 27 September 1989. A contract<sup>3</sup> for the sale or other disposition<sup>4</sup> of an interest in land can usually<sup>5</sup> only be made in signed<sup>6</sup> writing<sup>7</sup> and only by incorporating all the terms<sup>8</sup> which the parties have expressly<sup>9</sup> agreed in one document or, where contracts are exchanged, in each<sup>10</sup>. The effect of failure to comply with these requirements would appear to be to make the contract a nullity<sup>11</sup>; but it may be possible to avoid any potential injustice in relation to executory contracts<sup>12</sup> by use of the techniques of collateral contract<sup>13</sup>, constructive trust<sup>14</sup>, proprietary estoppel<sup>15</sup>, or restitution<sup>16</sup>.

1 See the Law of Property Act 1925 s 40(1) (repealed), which still applies to contracts made before 27 September 1989: Law of Property (Miscellaneous Provisions) Act 1989 s 2(7).

2 Ibid s 2(1), (8).

3 As to options see *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600 (and as to contracts of option see generally para 640 post); as to lock-outs see *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961, [1994] 1 WLR 327, CA (as to lock-out contracts generally see para 641 post); and see SALE OF LAND. But the provision does not affect the creation or operation of resulting, implied or constructive trusts: Law of Property (Miscellaneous Provisions) Act 1989 s 2(5).

4 'Disposition' extends to contracts to grant a mortgage or charge, so that it is no longer possible to create a valid charge simply by contract with a deposit of deeds: *United Bank of Kuwait v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA. It has, however, been held that the grant of an equitable charge over land does not need to be signed by the grantee of the charge: see *Murray v Guinness* [1998] NPC 79 per Lightman J; *sed quaere*.

5 The provision does not apply to short leases (see REAL PROPERTY); contracts made by public auction (as to which see also para 636 post), or contracts regulated by the Financial Services Act 1986: Law of Property (Miscellaneous Provisions) Act 1989 s 2(5).

6 The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract: *ibid* s 2(3). It seems that this provision renders it unnecessary for pre-contract correspondence to be headed 'subject to contract' (as to which see para 671 post).

7 The terms may be incorporated in the document either by being set out in it or by reference to some other document: *ibid* s 2(2). As to incorporation by reference see generally para 688 post.

8 But the accidental omission of an expressly agreed term from a document may not be fatal as the document may be rectified: see *ibid* s 2(4). As to rectification see generally para 896 post.

9 Contra implied terms, as to which see generally para 778 et seq post.

10 This allows continuation of the traditional method of making such contracts by an exchange of signed documents: see generally para 637 post. It would also appear to oust the parol evidence rule: see para 622 ante.

11 This is because the contract can 'only be made in writing': Law Reform (Miscellaneous Provisions) Act 1989 s 2(1); and see *Godden v Merthyr Tydfil Housing Association* [1997] NPC 1, CA.

12 The provision probably does not apply to executed contracts: see *Tootal Clothing Ltd v Guinea Properties Ltd* (1991) 64 P & CR 452 at 455, CA, per Scott LJ, and at 456 per Boreham J and Parker LJ.

13 See *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853. As to collateral contracts generally see para 753 post.

14 Law of Property (Miscellaneous Provisions) Act 1989 s 2(5). As to constructive trusts see generally TRUSTS vol 48 (2007 Reissue) para 687 et seq.

15 See *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA; *Godden v Merthyr Tydfil Housing Association* [1997] NPC 1, CA; and ESTOPPEL vol 16(2) (Reissue) para 1089.

16 See *Deglman v Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 785; and RESTITUTION vol 40(1) (2007 Reissue) para 122.

## **UPDATE**

### **624 The sale of an interest in land**

NOTE 4--A contract of disposition of an interest in land need not be in writing: *Target Holdings Ltd v Priestly* [2000] 79 P&CR 305. See also *Yaxley v Gotts* [2000] 1 All ER 711, CA (creation of constructive trust).

NOTE 5--Law of Property (Miscellaneous Provisions) Act 1989 s 2(5) amended: SI 2001/3649, SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

NOTE 15--See further SALE OF LAND vol 42 (Reissue) PARA 29.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(2) CONTRACTS REQUIRED TO BE IN WRITING/625. Other instances.

### **625. Other instances.**

Enactments make writing necessary in relation, inter alia, to: declarations of trust in respect of land and dispositions of equitable interests or of interests in land<sup>1</sup>; agreements between a master and seamen<sup>2</sup>; marine insurance policies<sup>3</sup>; bills of sale<sup>4</sup>; assignments of copyright<sup>5</sup>; bills of exchange, cheques and promissory notes<sup>6</sup>; regulated loans<sup>7</sup>; loans to persons engaged in business when the rate of interest is to vary with profits or the lender is to receive a share of profits and desires not to incur the liabilities of a partner<sup>8</sup>; special agreements made by a solicitor with his client for remuneration<sup>9</sup>; regulated agreements with a pawnbroker in respect of pledges<sup>10</sup>; agreements between the proprietor and driver of a hackney carriage for payment of money on account of the earnings of the carriage in London<sup>11</sup>; certain contracts relating to agricultural holdings<sup>12</sup>; agreements to submit differences to arbitration<sup>13</sup>; and memoranda and articles of association of companies<sup>14</sup>.

There are also other documents relating to associations of persons which, either by statute or by the necessity of the case, must be in writing. An example of this is an instrument of dissolution of a building society<sup>15</sup>.

1 See the Law of Property Act 1925 s 53. The creation of an interest in land also requires writing (see s 53(1) (a)), but there are exceptions for the creation of interests in land by parol (see s 54(2); and SALE OF LAND).

2 See the Merchant Shipping Act 1995 ss 25, 26; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 450 et seq.

3 See the Marine Insurance Act 1906 s 22; and INSURANCE vol 25 (2003 Reissue) para 220 et seq.

4 See the Bills of Sale Act 1878 ss 4, 8; the Bills of Sale Act (1878) Amendment Act 1882 s 9.

5 See the Copyright, Designs and Patents Act 1988 s 90(3); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) para 160.

6 See the Bills of Exchange Act 1882 ss 3, 17(2), 73, 83; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1400 et seq. This requirement modifies the effect of the parol evidence rule: see para 622 ante.

7 See the Consumer Credit Act 1974 s 8 (as amended); and CONSUMER CREDIT paras 80-81 ante.

8 See the Partnership Act 1890 s 2(3)(d); *Pooley v Driver* (1876) 5 ChD 458; and PARTNERSHIP vol 79 (2008) PARA 20.

9 See the Solicitors Act 1974 ss 57, 59 (as amended); and LEGAL PROFESSIONS vol 66 (2009) PARA 931.

10 See the Consumer Credit Act 1974 s 114(1) (pawn receipts); and CONSUMER CREDIT para 210 ante.

11 See the London Hackney Carriages Act 1843 s 23 (amended by the Finance Act 1985 s 98, Sch 27 Part IX(2)); and ROAD TRAFFIC.

12 See the Agricultural Holdings Act 1986 s 6, Sch 1; and AGRICULTURAL LAND vol 1 (2008) PARA 330.

13 See the Arbitration Act 1996 s 5; and ARBITRATION vol 2 (2008) PARA 1213. Oral submissions continue to be valid but do not attract the provisions of the Act; they still have effect at common law.

14 See the Companies Act 1985 ss 1, 2, 7; and see generally COMPANIES.

15 See the Building Societies Act 1986 s 87 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2066.

### **UPDATE**

## **625 Other instances**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 14--Companies Act 1985 ss 1, 2, 7 replaced by Companies Act 2006 ss 3-5, 7, 8, 11. See generally COMPANIES vol 14 (2009) PARA 243 et seq.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(2) CONTRACTS REQUIRED TO BE IN WRITING/626. Exceptions.

## **626. Exceptions.**

Where writing is required in respect of a particular type of contract by one of the provisions previously considered<sup>1</sup>, the absence of writing will be fatal to a claim on the contract<sup>2</sup>, unless it is based on a severable promise falling outside the statute<sup>3</sup>; or unless, in the case of a contract which is merely required to be evidenced in writing, it may be possible to invoke the equitable doctrine of part performance<sup>4</sup>. However, non-compliance with the relevant statutory provisions will not necessarily preclude a claim in restitution; it may be possible to sue on a quantum meruit basis<sup>5</sup>, to recover from the defendant money paid to a third party under the contract<sup>6</sup>, or upon an account stated<sup>7</sup>.

1 See paras 623-625 ante.

2 For the effects of non-compliance see para 623 ante. Whilst preventing an action, it will not necessarily preclude the use of performance or the other party's non-performance as a defence in a collateral claim: see *Thomas v Brown* (1876) 1 QBD 714; and SALE OF LAND.

3 As to severable promises see para 627 post.

4 Ie notwithstanding the Law of Property (Miscellaneous Provisions) Act 1989: see para 624 ante; and *Rawlinson v Ames* [1925] Ch 96; and see generally SALE OF LAND.

5 See para 628, and RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

6 As to money paid at the defendant's request see RESTITUTION vol 40(1) (2007 Reissue) para 6. But money paid by the plaintiff to the defendant under such a contract cannot be recovered on grounds of total failure of consideration: see RESTITUTION vol 40(1) (2007 Reissue) para 87 et seq.

7 See RESTITUTION.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(2) CONTRACTS REQUIRED TO BE IN WRITING/627. Entire and divisible contracts.

## 627. Entire and divisible contracts.

It is a matter of construction to be determined in the light of all the evidence whether a contract is an indivisible whole or whether the obligations which it enforces can be divided into two or more related but separate agreements<sup>1</sup>. In the former case the whole contract falls to the ground unless it complies entirely with the statutory requirements as to form<sup>2</sup>. In the latter case, if a severable part of the contract, not within the statutory requirement, alone does not comply it may be enforced though there is not the required writing<sup>3</sup>. Thus, if there is an oral collateral agreement not amounting to a disposition of an interest in land<sup>4</sup>, the fact that the written agreement for the disposition of an interest in land is within such an enactment does not prevent the collateral agreement from being enforced without written evidence<sup>5</sup>.

1 For the distinction between entire and divisible contracts see para 922 post.

2 *Thomas v Williams* (1830) 10 B & C 664 (where the plaintiff, a landlord, went to distrain for rent on the day of the sale by the defendant, an auctioneer, and the defendant promised, if the landlord did not distrain, to pay the rent then due and the rent for the next quarter. It was held that the whole contract was unenforceable, because the contract to pay the future rent was within the Statute of Frauds (1677)); *Mechelen v Wallace* (1837) 7 Ad & El 49 (lease of furnished house, landlord agreeing to provide further furniture); *Harman v Reeve* (1856) 18 CB 587 (sale of goods above the value of £10 accompanied by an agreement for keep and feed of a mare and foal); *Vaughan v Hancock* (1846) 3 CB 766 (letting of furnished house, tenant to pay the cost of alterations and take furniture at a valuation); *Earl of Falmouth v Thomas* (1832) 1 Cr & M 89 (lease of farm, tenant taking crops and materials at a valuation); *Chater v Beckett* (1797) 7 Term Rep 201 (promise to pay the debt of another and also to pay expenses of a bankruptcy commission in consideration of the non-prosecution of the commission); *Savage v Canning* (1867) 16 WR 133 (agreement for sale of land, with provision as to set-off against purchase price); *Lord Lexington v Clarke* (1689) 2 Vent 223 (promise to pay arrears of rent due from another, and also to pay future rent, in consideration of forbearance by landlord to evict); *Cooke v Tombs* (1794) 2 Anst 420 (agreement for sale of land and chattels); *Hodgson v Johnson* (1858) EB & E 685 (agreement for sale of land, with plant to be taken at a valuation); *Bellaney v Knight* (1862) 5 LT 785 (written agreement to sell land delineated on plan, with subsequent oral agreement varying measurements); *Foquet v Moor* (1852) 7 Exch 870 (agreement for surrender of lease and grant of new lease, with agreement that pending a new lease the tenant should remain on a year to year tenancy); *Hawkesworth v Turner* (1930) 46 TLR 389 (sale of business premises together with goodwill and stock in trade).

3 *Mayfield v Wadsley* (1824) 3 B & C 357 (agreements between incoming and outgoing tenants for the sale of growing crops and dead stock).

4 For the effect of an oral variation which purports to effect a disposition of an interest in land see para 1024 post.

5 *Morgan v Griffith* (1871) LR 6 Exch 70; *Erskine v Adeane* (1873) 8 Ch App 756 (lease of farm lands, with oral agreement to keep down game); *Angell v Duke* (1875) LR 10 QB 174 (letting of furnished house, with agreement for additional furniture and repairs); *Archer v Hall* (1859) 7 WR 222 (sale of land, with oral agreement as to set-off against purchase price); *Boston v Boston* [1904] 1 KB 124, CA (oral collateral promise of indemnity in respect of purchase of house); *Re Banks, Weldon v Banks* (1912) 56 Sol Jo 362 (oral agreement by wife to indemnify husband in respect of rent of house); *Jameson v Kinnell Bay Land Co Ltd* (1931) 47 TLR 593, CA (agreement for sale of land, with oral undertaking to construct a road over it); *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733; *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853. For a discussion of when an oral representation amounts to a contractual promise see para 768 post; and as to collateral contracts see para 753 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/2. FORM AND FORMALITIES/(2) CONTRACTS REQUIRED TO BE IN WRITING/628. Performance.

## **628. Performance.**

Notwithstanding performance of the contract by the plaintiff, a defendant is not precluded by the fact of that performance from setting up non-compliance with the Statute of Frauds (1677)<sup>1</sup>. Where, however, the contract has been performed by the plaintiff, and anything has been done by the defendant as a result of which the law would imply a promise to pay quantum meruit, the plaintiff can recover in restitution despite the failure to comply with the statutory provisions<sup>2</sup>. The above rules can now only apply to promises to answer for the debt, default or miscarriage of another<sup>3</sup> and do not apply to the modern statutory provisions regarding the sale or other disposition of an interest in land<sup>4</sup>.

1 *Cocking v Ward* (1845) 1 CB 858 at 868, obiter per Tindal CJ; *Kelly v Webster* (1852) 12 CB 283; *Sanderson v Graves* (1875) LR 10 Exch 234 (all cases concerned with the transfer of an interest in land); *Boydell v Drummond* (1809) 11 East 142 (contract to subscribe to a series of prints not to be completed within a year). For the statutory provisions as to form see paras 623-625 ante.

2 *Sanderson v Graves* (1875) LR 10 Exch 234 at 238 per Bramwell B. The restitutionary claim of quantum meruit is considered in para 618 ante, and RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

3 See the Statute of Frauds (1677) s 4 (as amended) (the only section still extant: see para 1025 note 17 post); and see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

4 See para 624 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(1) INTRODUCTION/629. In general.

### 3. FORMATION OF CONTRACT

#### (1) INTRODUCTION

##### 629. In general.

A valid contract requires: (1) an agreement; (2) an intention to create legal relations; and (3) consideration<sup>1</sup>. Whilst each of these three requirements receives separate treatment<sup>2</sup>, they must in reality be looked at together<sup>3</sup>.

The major part of this section of the title is concerned with an analysis of the formation of agreement between two or more parties of competent capacity<sup>4</sup>. Whilst the general principles of formation of agreement<sup>5</sup> are applicable to all types of contract<sup>6</sup>, two cases require separate treatment: (a) agreements made through the post<sup>7</sup>; and (b) written agreements, and written terms in oral agreements<sup>8</sup>. Moreover, in all cases the consent necessary to any agreement may be affected by mistake or other factors<sup>9</sup>.

1 The general requirements of a valid contract are outlined in para 603 ante.

2 As to agreement see para 631 et seq post; as to intention to create legal relations see para 718 et seq post; and as to consideration see para 727 et seq post.

3 See eg *Dickinson v Abe*[1969] 1 All ER 484, [1969] 1 WLR 295 (conditional promise without consideration; no consensus).

4 As to capacity to contract see para 630 post.

5 As to the general principles of formation of agreement see para 631 et seq post. A number of changes in these principles are to be found in the Uniform Law on the Formation of Contracts for the International Sale of Goods (here referred to as 'ULFIS'), which forms the Uniform Laws on International Sales Act 1967 s 2, Sch 2. ULFIS only applies to contracts for the sale of goods which, if they were concluded, would be governed by the Uniform Law on the International Sale of Goods: Uniform Laws on International Sales Act 1967 Sch 2 art 1. The Uniform Law on the International Sale of Goods, which forms s 1, Sch 1 only applies to contracts for the international sale of goods: Sch 1 art 1. As to the sphere of its application see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 322, 382.

As to alterations made in the English law for the formation of contract see para 684 post; and as to export and import licences see para 788 post.

6 For a general discussion of the different types of contract see para 619 ante.

7 As to agreements made through the post see para 676 et seq post.

8 As to written agreements, and written terms in oral agreements, see para 685 et seq post.

9 Matters, such as mistake or duress, which may go to the consent of the parties, are considered in para 703 et seq post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(1) INTRODUCTION/630. Capacity to contract.

### **630. Capacity to contract.**

In general, a valid contract may be made by any person recognised by law as having legal personality, that is natural persons, corporations<sup>1</sup> and the Crown<sup>2</sup>. However, the following classes of persons are in law incompetent to contract, or are only capable of contracting to a limited extent or in a particular manner: (1) bankrupts<sup>3</sup>; (2) minors<sup>4</sup>; (3) persons of unsound mind<sup>5</sup>; (4) alien enemies<sup>6</sup>; (5) drunkards<sup>7</sup>; (6) corporations<sup>8</sup>; (7) companies<sup>9</sup>; (8) partnerships<sup>10</sup>; and (9) receivers of companies<sup>11</sup>. Provision is also made to exclude from the courts of the United Kingdom proceedings with regard to the pay or service of members of certain visiting forces<sup>12</sup>.

Such incapacity might be seen in some cases in terms of a lack of good faith on the part of the other party<sup>13</sup>.

1 See generally CORPORATIONS.

2 It is now generally possible to sue the Crown as of right for breach of contract: see the Crown Proceedings Act 1947 s 1. But see *Crown Lands Comrs v Page* [1960] 2 QB 274, [1960] 2 All ER 726, CA; *Cudgen Rutile (No 2) Pty Ltd v Chalk, Queensland Titanium Mines Pty Ltd v Chalk* [1975] AC 520, PC, [1975] 2 WLR 1.

3 A bankrupt's property vests on adjudication in the trustee in bankruptcy: see the Insolvency Act 1986; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 390 et seq. As to the effect on a contract of bankruptcy before the formation of the contract see paras 649 note 10, 651 note 18 post; and as to bankruptcy thereafter see para 1067 et seq post. As to rights under uncompleted contracts relating to land see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 419.

4 The age of majority is 18 years (see the Family Law Reform Act 1969 s 1); and the contractual incapacity of minors was much reduced by the Minors' Contracts Act 1987. As to the rights and liabilities of minors in respect of contracts to which they purport to become a party see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 12 et seq.

5 As to the rights and liabilities of persons of unsound mind in respect of contracts to which they purport to become a party see MENTAL HEALTH vol 30(2) (Reissue) para 600 et seq; as to the effect of insanity on the power to enter into a contract see para 649 post. See also *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC.

6 The rights and liabilities of an alien to sue and be sued in respect of a contract generally depend on whether he is an alien friend or an alien enemy. An alien friend can sue and be sued in the same manner as a British citizen: see generally BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 13. As to the position with regard to contracts with an alien enemy see para 902 post; and see generally WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) para 573 et seq.

7 The effect of drunkenness by a party at the time he purports to contract is considered at para 717 post.

8 As to the power of corporations (other than registered companies) to contract see CORPORATIONS; LOCAL GOVERNMENT vol 69 (2009) PARA 492. As to contracts with unincorporated associations see para 765 post. As to contracts between a building society and its members see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1873, 1878.

9 There are specific rules which govern contracts made by registered companies with: (1) members; (2) third parties (including pre-incorporation contracts): see COMPANIES vol 14 (2009) PARA 279 et seq; and (3) registered companies in liquidation: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) paras 747-748. As to the effect on the contract of winding up before the formation of a contract see paras 649 note 10, 651 note 18 post; as to winding up thereafter see para 1071 post.

10 As to the position with regard to both the contract of partnership and contracts by the partnership with third parties see respectively PARTNERSHIP vol 79 (2008) PARAS 38-42, 45 et seq.

11 As to the position where a contracting party is a registered company in the hands of an administrative receiver see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 172; and see generally RECEIVERS.

12 See para 1075 post.

13 See para 613 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(i) Agreement/631. In general.

## (2) OFFER AND ACCEPTANCE

### (i) Agreement

#### 631. In general.

Agreement is usually<sup>1</sup> reached by the process of offer and acceptance and, where this is so, the law requires that there be an offer on ascertainable terms<sup>2</sup> which receives an unqualified acceptance<sup>3</sup> from the person to whom it is made<sup>4</sup>. In the nineteenth century, the popular theory was that there could be no contract without a meeting of the minds of the parties, consensus ad idem<sup>5</sup>. This is still the general rule<sup>6</sup>, so that, where the intended acceptance is not in accordance with the terms of the offer, the court may find that there is no binding contract<sup>7</sup>, even though both parties to the purported contract contend that there is a binding contract<sup>8</sup>.

The strict consensus theory has, however, been modified and, even apart from the exceptional rules governing communications by post<sup>9</sup> and the fact that a contract may have retrospective effect<sup>10</sup>, it is now well settled that, where one party (A) expresses an apparent intention (objective intention) which does not express what he actually means in his own mind (subjective intention), an apparent meeting of the minds of the parties may suffice for a binding contract. Where A has so conducted himself that a reasonable person would believe that he is unambiguously<sup>11</sup> assenting to the terms as proposed by the other party (B), A is precluded from setting up his real intention and is bound by the contract as if he had intended to agree to B's terms<sup>12</sup>. This is certainly the case where B believes that A's statement expresses A's intention<sup>13</sup>; but B cannot accept A's apparent offer where B knows that that does not accord with A's subjective intention<sup>14</sup>. There is some doubt over the intermediate situation, where a reasonable person would believe A's objective intention but B has no such belief without actually being aware of A's subjective intention: one view is that A is not bound<sup>15</sup>; another is that A is bound by his objective intention<sup>16</sup>.

At present, there would appear to be no general duty under English common law for the parties to negotiate in good faith<sup>17</sup>; but there are statutory provisions to this effect applicable in some circumstances<sup>18</sup>.

1 It was held that agreement was not reached by the usual means of offer and acceptance in eg *The Satanita*[1895] P 248 at 255, CA, per Lord Esher MR (contracts between competitors entering in a race); (affd [1897] AC 59, HL); *Meggesson v Burns* [1972] 1 Lloyd's Rep 223, Mayor's and City of London Ct; *Rayfield v Hands*[1960] Ch 1, [1958] 2 All ER 194 (contract between members of a company on the basis of the articles); *Simpkins v Pays*[1955] 3 All ER 10, [1955] 1 WLR 975 (a syndicate to enter a competition); *Re Wyvern Developments Ltd*[1974] 2 All ER 535, [1974] 1 WLR 1097 (A contracted to sell land to B, who went into liquidation before completion. A, B and B's liquidator combined to sell land to C); and see *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*[1975] AC 154 at 167-168, [1974] 1 All ER 1015 at 1020, PC, per Lord Wilberforce. See also paras 665, 751 post.

2 See eg *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5, CA; *Anglia Television Ltd v British Broadcasting Corp*n [1989] CLY 432. As to the effect of uncertainty as to the terms of an alleged agreement see para 672 post. Offers are considered in para 632 et seq post.

3 Acceptances are considered in para 650 et seq post. As to the effect of an acceptance subject to conditions see para 670 post. It may sometimes be difficult to decide whether a particular act in a series of negotiations is an offer or an acceptance: see eg *Re Metropolitan Fire Insurance Co, Wallace's Case*[1900] 2 Ch 671 (company reconstruction); *Jaglom v Excess Insurance Co Ltd*[1972] 2 QB 250, [1972] 1 All ER 267 (underwriter writing in line on broker's slip).

4 As to the effect of a purported acceptance by a person other than the offeree see para 704 post.

5 Eg it was held that a postal acceptance lost in the post did not complete a contract: *British and American Telegraph Co Ltd v Colson*(1871) LR 6 Exch 108; but this rule was later reversed: *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, CA; and see para 676 post. Similarly, it was said to be sufficient to revoke an offer that the offeror so intended (*Dickinson v Dodds*(1876) 2 ChD 463 at 472, CA, obiter per James LJ) but this notion too was rejected (see para 644 post). Cf the view in equity: *Kennedy v Lee* (1817) 3 Mer 441. See further para 701 post.

6 See eg *Anglo-Overseas Transport Co Ltd v Zanelotti Ltd* [1952] 1 Lloyd's Rep 232 at 236-241 per Slade J (a contract cannot be created by custom in the absence of agreement between the parties); *Sterling Engineering Co Ltd v Patchett*[1955] AC 534, [1955] 1 All ER 369, HL ('understanding and agreement'); *JH Milner & Son Ltd v Percy Bilton Ltd*[1966] 2 All ER 894, [1966] 1 WLR 1582 ('understanding'); *John Howard & Co (Northern) Ltd v JP Knight Ltd* [1969] 1 Lloyd's Rep 364 (agent of one party erroneously thought agreement had been reached).

7 See eg *Earl v Mawson* (1973) 228 Estates Gazette 529 at 533 per Walton J (affd (1974) 232 Estates Gazette 1315, CA).

8 *Mathieson Gee (Ayrshire) Ltd v Quigley* 1952 SC 38, HL; *Kingsley and Keith Ltd v Glynn Bros (Chemicals) Ltd* [1953] 1 Lloyd's Rep 211 at 217; and see *Scammell and Nephew Ltd v Ouston*[1941] AC 251 at 260-268, [1941] 1 All ER 14 at 20-26, HL; *Bishop and Baxter Ltd v Anglo-Eastern Trading and Industrial Co Ltd*[1944] KB 12 at 14, [1943] 2 All ER 598 at 599, CA: see also *Compagnie de Commerce et Commission SARL v Parkinson Stove Co Ltd* [1953] 2 Lloyd's Rep 487 at 502, CA; and para 688 note 7 post.

9 Eg a binding contract may be concluded whilst a letter of revocation of offer is in the post: *Byrne & Co v Van Tienhoven* (1880) 5 CPD 344. The postal rules are considered at para 676 et seq post.

10 *Trollope and Colls Ltd and Hannen and Cubitts Ltd v Atomic Power Constructors Ltd*[1962] 3 All ER 1035 at 1039, [1963] 1 WLR 333 at 339; *Wettern Electric Ltd v Welsh Development Agency*[1983] QB 796, [1983] 2 All ER 629; *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 29-30, CA. As to acceptance see para 650 post. As to implied terms see para 785 post.

11 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*[1972] AC 741, [1972] 2 All ER 271, HL; *Capital Finance Co Ltd v Bray*[1964] 1 All ER 603, [1964] 1 WLR 323, CA. See also the cases on abandonment cited in para 1014 post.

12 *Smith v Hughes*(1871) LR 6 QB 597 at 607 per Blackburn J. As to situations where the offeror has been estopped see the auction cases cited in para 633 note 10 post; and as to situations where the offeree has been estopped see the cases cited in para 654 notes 21-22 post. See also *Oades v Spafford*[1948] 2 KB 74, [1948] 1 All ER 607, CA; *Thomas v Brown*(1876) 1 QBD 714; and SALE OF LAND. See also *Re Economic Fire Office Ltd* (1896) 12 TLR 142; and INSURANCE. For a fuller discussion of estoppel see para 702 post; and see generally ESTOPPEL.

13 *André & Cie SA v Marine Transocean Ltd, The Splendid Sun*[1981] QB 694, [1981] 2 All ER 993, CA, as explained in *Paal Wilson & Co A/S v Partenreederie*[1983] 1 AC 854 at 924, [1983] 1 All ER 34 at 55, HL, per Lord Brightman (mutual agreement to abandon arbitration); *Chaloner v Bower*[1984] 1 EGLR 4, CA.

14 See para 703 post.

15 Ie that both a reasonable person and B must believe in A's objective intention: *Paal Wilson & Co A/S v Partenreederie*[1983] 1 AC 854, [1983] 1 All ER 34, HL, as interpreted in *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D*[1985] 2 All ER 796, [1985] 1 WLR 925, CA.

16 Ie that A is bound to his objective intention provided that a reasonable person believed it, so long as B did not actually disbelieve it: *Excomm Ltd v Guan Guan Shipping (Pte) Ltd, The Golden Bear* [1987] 1 Lloyd's Rep 330 at 341 per Staughton J; *Food Corp'n of India v Antclizo Shipping Corp'n, The Antclizo* [1987] 2 Lloyd's Rep 130 at 143, CA, per Bingham LJ (affd without reference to this point [1988] 2 All ER 513, [1988] 1 WLR 603, HL).

17 *Walford v Miles*[1992] 2 AC 128, [1992] 1 All ER 453, HL; but see para 613 ante.

18 Eg in consumer supplies: see the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(3), Sch 2; and para 793 post.

## UPDATE

### 631 In general

NOTE 18--SI 1994/3159 reg 4(3), Sch 2 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 reg 6.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/632. Meaning of 'offer'.

## (ii) Offer and Invitation to Treat

### 632. Meaning of 'offer'.

An offer is an expression<sup>1</sup> by one person or group of persons<sup>2</sup>, or by agents on his behalf<sup>3</sup>, made to<sup>4</sup> another<sup>5</sup>, of his willingness<sup>6</sup> to be bound<sup>7</sup> to a contract<sup>8</sup> with that other on terms either certain or capable of being rendered certain<sup>9</sup>.

An offer may be made to an individual<sup>10</sup> or to a group of persons<sup>11</sup> or to the world at large<sup>12</sup>. It may be made expressly by words<sup>13</sup>, or it may be implied from the conduct of the offeror<sup>14</sup>, as where the seller of goods tenders the wrong quantity<sup>15</sup>.

An offer must be distinguished from a mere invitation to treat<sup>16</sup>.

1 An offer may be express or implied: see para 618 ante.

2 As to joint promises see para 1079 et seq post.

3 Generally, whatever a person has a power to do himself he may do by means of an agent: see AGENCY vol 1 (2008) PARA 30.

4 As to communication of offer see para 642 post.

5 As to the requirement of two or more certain and separate parties see para 604 ante. See also *Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein*[1985] 1 All ER 475, [1985] 1 WLR 435, CA (identity of buyer undisclosed; as to undisclosed principals generally see AGENCY vol 1 (2008) PARAS 125, 156 et seq).

6 As to intention to create legal relations see para 718 et seq post.

7 An offer 'subject to contract' is not an offer: *Bennett, Walden & Co v Wood*[1950] 2 All ER 134, CA. As to agreements 'subject to contract' see para 671 post.

8 As to the meaning of 'a contract' see para 601 et seq ante.

9 For a discussion of the requirement of certainty of terms see para 672 post.

10 See eg *British Bank Foreign Trade Ltd v Novinex Ltd*[1949] 1 KB 623, [1949] 1 All ER 155, CA (written offer of commission in return for introduction).

11 See eg *The Satanita*[1897] AC 59, HL (contracts between entrants for a race).

12 As to offers to the world at large see para 639 post.

13 See eg *Errington v Errington and Woods*[1952] 1 KB 290, [1952] 1 All ER 149, CA ('the house will be your property when the mortgage is paid').

14 See eg *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*[1989] QB 433, [1988] 1 All ER 348, CA (dispatch of goods an offer by conduct); as where a contract is discharged by an agreement to abandon it inferred from conduct see para 1014 post.

15 See eg *Hart v Mills* (1846) 15 LJ Ex 200 (seller tendered more goods than those ordered); and see the Sale of Goods Act 1979 s 30(2), (3); and para 618 ante. But the discrepancy may be so great as to constitute a new offer, in which case statute may allow it to be treated as an unsolicited gift: see the Unsolicited Goods and Services Act 1971 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 657 et seq.

16 As to the distinction between an offer and an invitation to treat see para 633 post.

## **UPDATE**

### **632-633 Meaning of 'offer', Invitation to treat**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/633. Invitation to treat.

### 633. Invitation to treat.

An invitation to treat is a mere declaration of willingness to enter into negotiations; it is not an offer<sup>1</sup>, and cannot be accepted so as to form a binding contract<sup>2</sup>.

In practice, the formation of a contract is frequently preceded by preliminary negotiations. Some of the exchanges in these negotiations contain no declaration at all, as where one party simply asks for information<sup>3</sup>. Others may amount to invitations to the recipient to make an offer<sup>4</sup>, these being invitations to treat.

Thus, a distinction must be drawn between those declarations which amount to offers, and those which only amount to invitations to treat. Sometimes, a particular type of declaration is, at least prima facie, put into one or the other category by statute<sup>5</sup> or by common law<sup>6</sup>; but in all other cases it is a question of intention. An express statement that a declaration is not an offer is effective to prevent it being an offer<sup>7</sup>, but the mere use of the terminology 'invitation to treat' or 'offer' in the declaration may not be conclusive one way or the other<sup>8</sup>. Otherwise, the vital question is the intention of the declarant<sup>9</sup>, though his actual intention may give way to a contradictory apparent intention<sup>10</sup>.

Whether the actual intention of the declarant does give way to his apparent intention cannot usually depend on his subsequent conduct<sup>11</sup>, but may be affected by the state of mind of the declarant<sup>12</sup>.

1 As to the meaning of 'offer' see para 632 ante.

2 *Gibson v Manchester City Council* [1979] 1 All ER 972, [1979] 1 WLR 294, HL. As to the meaning of 'acceptance' see para 650 post.

3 See eg *Harvey v Facey* [1893] AC 552, PC ('Will you sell us...telegraph lowest cash price...'; and see paras 637, 650, 667 post).

4 See eg *Spencer v Harding* (1870) LR 5 CP 561 (advertisement requesting tenders; and see para 635 post); *Kahn v Evans* [1985] RTR 33, DC (taxi plying for hire); *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, [1988] 1 All ER 348, CA (telephone request for supply of goods; subsequent supply an offer by conduct: see para 632 ante).

5 Eg sales by auction: see the Sale of Goods Act 1979 s 57(2), codifying *Payne v Cave* (1789) 3 Term Rep 148; and see para 636 post.

6 See eg *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401, [1953] 1 All ER 482, CA (priced goods on shelf in self-service store; and see para 634 post); *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All ER 966, HL (common intention to perform an existing invalid contract not an offer; and as to referential bids see para 635 post).

7 See eg *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA ('this agreement shall become binding on the owner only upon acceptance by signature'; held: no offer by owner). But see *Appleby v Errington* [1952] CLY 1352 (in negotiating for a settlement of an action counsel said he was not binding himself; claim withdrawn; held: compromise binding). As to intention to create legal relations see para 718 post.

8 See eg *Spencer v Harding* (1870) LR 5 CP 561 ('We are instructed to offer...for sale by tender...': see also para 635 post); *Clifton v Palumbo* [1944] 2 All ER 497, CA ('I...am prepared to offer you...my...estate for £600,000...': see also para 637 post). Similarly, *Bigg v Boyd Gibbins Ltd* [1971] 2 All ER 183, [1971] 1 WLR 913, CA (communication termed an 'acceptance'; held: an offer); *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All ER 966, HL (communication requesting another to make an 'offer' itself; held to be an offer).

9 *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All ER 966, HL (invitation to fixed bidding). For instance, in the following cases it was held that no offer was intended: *Moorhouse v Colvin* (1851) 15 Beav 341 (father stated that he would give daughter property on her marriage); *Re Fickus, Farina v Fickus* [1900] 1 Ch 331 (similar case); *Licenses Insurance Corpn and Guarantee Fund Ltd v Lawson* (1896) 12 TLR 501 (statement at board meeting that he would make good any loss arising on investment); *Montreal Gas Co v Vasey* [1900] AC 595, PC ('we would favourably consider an application from you...for a renewal of the [contract]'); *Loftus v Roberts* (1902) 18 TLR 532, CA ('I agree to engage you...at a West End salary'); *British Homophone Ltd v Kunz and Crystallite Gramophone Record Manufacturing Co Ltd* (1935) 152 LT 589 (an option granted 'on terms to be hereinafter agreed'); *Clifton v Palumbo* [1944] 2 All ER 497, CA (see note 8 supra); *Rapalli v KL Take Ltd* [1958] 2 Lloyd's Rep 469, CA (see para 634 note 9 post). See also *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234 (letter merely part of negotiations as to price).

10 For instance, the cases where a person at an auction bids under a mistake: *Robinson, Fisher and Harding v Behar* [1927] 1 KB 513, DC (bid for wrong lot); *Tamplin v James* (1880) 15 ChD 215, CA (mistaken impression that lot included two extra plots at back of inn). As to auctions see para 636 post; and as to mistake see para 703 et seq post. See also *Moran v University College Salford (No 2)* [1994] ELR 187, CA (a clerical error which offered a University place).

11 *Rapalli v KL Take Ltd* [1958] 2 Lloyd's Rep 469 at 484, CA, per Romer LJ (the subsequent conduct of a party cannot convert an invitation to treat into an offer, but might itself amount to a new (possibly implied) offer). As to offers possibly having retrospective effect see para 631 ante.

12 See para 769 post.

## UPDATE

### 632-633 Meaning of 'offer', Invitation to treat

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/634. Offer and invitation to treat: examples.

#### **634. Offer and invitation to treat: examples.**

There have been decisions on whether particular exchanges amounted to offers or invitations to treat in the context of tendering<sup>1</sup>, auctions<sup>2</sup>, sales of land<sup>3</sup> and 'ticket' contracts<sup>4</sup>; and also, inter alia, in the following cases:

- 8 (1) an announcement that a scholarship examination would be held was not an offer of the prize to the competitor who obtained the highest marks<sup>5</sup>;
- 9 (2) a resolution by a corporation that any of its employees who might volunteer for military service should receive during such service the difference between his army pay and the salary he received in the corporation's employment was an offer<sup>6</sup>;
- 10 (3) an announcement in a carrier's time-tables that a conveyance would run amounted to an offer<sup>7</sup>;
- 11 (4) a catalogue or price list when circulated only amounted to an invitation to treat<sup>8</sup>; and a similar view was prima facie taken of a personal quotation of the price of goods<sup>9</sup>, though not of services<sup>10</sup>. Where, however, there has been a quotation for the price of goods, it has sometimes been possible for the courts to spell out, for instance from the prior negotiations, an intention that that quotation should amount to an offer<sup>11</sup>; and a firm request for the supply of goods will usually amount to an offer to buy them<sup>12</sup>;
- 12 (5) a display of goods for sale with price tickets attached is probably only an invitation to treat, whether the goods be in a shop window<sup>13</sup> or on a shelf in a self-service store<sup>14</sup>; but a display of deck-chairs on a beach for hire has been held to be an offer<sup>15</sup>;
- 13 (6) the 15-day temporary cover note sent by an insurance company to the insured at the expiration of his policy was held to be an offer<sup>16</sup>;
- 14 (7) normally, an offer to the public asking them to subscribe for shares in a company is only an invitation to treat<sup>17</sup>; but an invitation to existing share or debenture holders to take up a rights issue or a conversion issue may amount to an offer<sup>18</sup>;
- 15 (8) where the parties intend to contract on the basis of a standard form of agreement<sup>19</sup>, the delivery of that form by the proferens (the offeror)<sup>20</sup> will prima facie amount to an offer<sup>21</sup>. But, where the document evinced an intention that the proferens should not be bound until he signed it, its delivery by the proferens was only an invitation to treat<sup>22</sup>;
- 16 (9) pleadings may constitute an offer<sup>23</sup>.

1 See para 635 post.

2 See para 636 post.

3 See para 637 post.

4 See para 638 post.

5 *Rooke v Dawson* [1895] 1 Ch 480.

6 *Shipton v Cardiff Corpn* (1917) 87 LJKB 51; *Davies v Rhondda UDC* (1917) 87 LJKB 166, CA. As to whether bonuses are included in such a contract see *Sutton v A-G* (1923) 39 TLR 295, HL; *Railway Clearing House v*

*Druce* (1926) 135 LT 417, HL; *Aylott v West Ham Corp* [1927] 1 Ch 30, CA; *Stevens v Hampstead Borough Council* [1929] 2 Ch 239. As to the statutory powers to make up civil remuneration to employees see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt V (ss 46-53) (as amended); and ARMED FORCES.

7 *Denton v Great Northern Rly Co* (1856) 5 E & B 860. See CARRIAGE AND CARRIERS vol 7 (2008) PARA 77.

8 *Grainger & Son v Gough* [1896] AC 325, especially at 333, HL, per Lord Herschell (a decision on the application of the Income Tax Acts); *CA Norgren & Co v Technomarketing* [1983] CLY 503 (a copyright decision). See also *Partridge v Crittenden* [1968] 2 All ER 421, [1968] 1 WLR 1204, DC (decision on criminal law statute in respect of a classified advertisement in a magazine). But any advertisement may amount to an offer to the whole world: see para 639 post.

9 *Boyers v Duke* [1905] 2 IR 617 (requested quotation: 'lowest price ... delivery of 3,000 yards in five to six weeks'); *Rapalli v KL Take Ltd* [1958] 2 Lloyd's Rep 469, CA (telegram by 'buyers' following negotiations for sale of cauliflowers: 'Interested maximum price 13s....'). See also *Johnston Bros v Rogers Bros* (1899) 30 OR 150, Ont CA (quote defined as 'to give the current or market price of'); *Imperial Glass Ltd v Consolidated Supplies Ltd* (1960) 22 DLR (2d) 759, BC CA.

10 See para 635 post.

11 *Philp & Co v Knoblauch* 1907 SC 994 (quotation, and the words 'I shall be glad to hear if you are buyers'); *Dalrymple v Scott* (1892) 19 OAR 477, Ont CA (P wired: 'Quote for May shipment ... reply quick'. D replied by letter: 'We will ship you ... fob here May shipment... If these figures meet with your approval, we would be pleased to open up business with you'. D's letter amounted to an offer).

12 See eg *Deering Milliken & Co Inc v Drexler* 216 F 2d 116 (USA 5th Cir 1954) (D placed an order for the purchase of goods on stated terms by instalments, and P delivered the first instalment, together with an invoice referring to the order. The next day, P posted a 'confirmation' containing different terms, and providing that acceptance might be made either in writing or by acceptance of any instalment. D did not reply, but did accept and pay for a further instalment; held: (1) the order was an offer; (2) delivery of the first instalment was an acceptance (see para 653 post); (3) the 'confirmation' was a new offer (see para 661 head (6) post); and (4) the counter-offer was accepted neither by taking delivery of an instalment nor by silence (see para 655 post)).

13 *Fisher v Bell* [1961] 1 QB 394, [1960] 3 All ER 731, DC (decided under the Restriction of Offensive Weapons Act 1959 s 1 prior to its amendment by the Restriction of Offensive Weapons Act 1961 s 1: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 705); *Minister for Industry and Commerce v Pim Bros Ltd* [1966] IR 154. But see *Wiles v Maddison* [1943] 1 All ER 315, DC (prosecution under the wartime rationing orders, now repealed).

14 *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401, [1953] 1 All ER 482, CA (customer taking goods off shelf does not agree to buy); *Martin v Puttick* [1968] 2 QB 82, [1967] 1 All ER 899, DC (goods selected at meat counter). Cf *Lasky v Economy Grocery Stores* 65 NE 2d 305, 163 ALR 235 (1946).

15 *Chapelton v Barry UDC* [1940] 1 KB 532, [1940] 1 All ER 356, CA. Similarly, in the following cases, it has been held that goods have been offered for sale: *Keating v Horwood* (1926) 135 LT 29, DC (bread on a bakery delivery van); *Phillips v Dalziel* [1948] 2 All ER 810, DC, [1948] WN 429 (shoes in boxes stacked on shelves of a shoe shop).

16 *Taylor v Allon* [1966] 1 QB 304, [1965] 1 All ER 557, DC. As to interim insurance by means of cover notes see INSURANCE.

17 *Re National Savings Bank Association, Hebb's Case* (1867) LR 4 Eq 9; and see further COMPANIES.

18 *Jackson v Turquand* (1869) LR 4 HL 305; and see further COMPANIES.

19 As to standard form agreements see generally para 771 post.

20 'Proferens' is a convenient expression for the person who draws up the printed terms and introduces them into the negotiations: see further para 803 post.

21 See eg *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965, [1979] 1 WLR 401, CA (the ticket contracts); and para 638 post.

22 *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA; *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA. As to proposal forms in contracts of insurance see *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334, CA; and INSURANCE.

23 See *Lovely and Orchard Services Ltd v Daejan Investments (Grove Hall) Ltd* (1977) 246 Estates Gazette  
651.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/635. Tenders.

### 635. Tenders.

An advertisement that goods or services are to be bought or sold by tender is not, *prima facie*<sup>1</sup>, an offer to sell to the person making the highest tender<sup>2</sup>, even though compilation of the tender may involve significant expense. However, this common law rule may be excluded by a contrary intention<sup>3</sup>; or the invitation to tender may be accompanied by a collateral contract<sup>4</sup>; or there may be liability in restitution<sup>5</sup>; or the position may be modified by legislation<sup>6</sup>.

Where the above common law presumption applies, the actual tender will normally amount to an offer; for example a tender for work and labour<sup>7</sup> (even though in the form of an estimate<sup>8</sup>), or a tender for the sale or purchase of goods<sup>9</sup>. It follows that in the usual case, acceptance of such a tender concludes a binding contract<sup>10</sup>. In one instance, however, such an acceptance does not usually have this effect. Ordinarily, a tender for the supply of such goods as may be required, no quantity being specified, is not an offer which may be accepted generally so as to form a binding contract, but is a continuing offer, which is accepted from time to time whenever an order is given for any of the goods specified in the tender<sup>11</sup>. An acceptance of such a tender merely amounts to an intimation that the offer will be considered to remain open during the period specified, and that it will be accepted from time to time by orders for specific quantities, and does not bind either party unless and until such orders are given<sup>12</sup>. Nevertheless, a tender may be so worded as to impose an obligation on the person who accepts it to order all the goods that he requires for a particular business or purpose during the period specified from the person whose tender has been accepted, provided it is sufficiently specified what the terms of the contract are<sup>13</sup>.

1 Thus, it is a matter of construction whether an invitation from a prospective vendor is to take part in an auction, where offers/bids are referential (see para 636 post), or a fixed bidding sale, where referential bids are not allowed: *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All 966, HL. As to referential bids see note 3 infra.

2 *Spencer v Harding* (1870) LR 5 CP 561; *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241.

3 *South Hetton Coal Co v Haswell, Shotton and Easington Coal and Coke Co* [1898] 1 Ch 465, CA (V proposed to receive sealed tenders from two competing parties, X and Y, undertaking to accept the highest net money tender. X offered such sum as would exceed by £200 the amount offered by Y; held: V had made an offer, but it had not been unconditionally accepted by X); applied in *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All ER 966, HL (see note 1 supra). See also *Saltzberg and Rubin v Hollis Securities Ltd* (1964) 48 DLR (2d) 344, NS SC.

4 *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1195, CA.

5 *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712, [1957] 1 WLR 932 (estimate also required for submission to War Damage Commission).

6 See eg the Utilities Contracts Regulations 1996, SI 1996/2911, implementing EC Council Directive 93/38 (OJ L199, 9.8.93, p 84) (as amended).

7 *A Davies & Co (Shopfitters) Ltd v William Old Ltd* (1969) 67 LGR 395. See also BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

8 *Croshaw v Pritchard and Renwick* (1899) 16 TLR 45.

9 *Great Northern Rly Co v Witham* (1873) LR 9 CP 16; *R v Demers* [1900] AC 103, PC; *Re Gloucester Municipal Election Petition, 1900*, *Ford v Newth* [1901] 1 KB 683: see also *Burton v Great Northern Rly Co*



(1854) 9 Exch 507 (agreement by railway company to carry all goods tendered for carriage); *Kells Union Guardians v Smith* (1917) 52 ILT 65 (tender for supply of goods accepted and subsequently withdrawn).

10 *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 (see para 644 note 10 post). As to acceptance of tenders see further para 658 post; and as to the incorporation of the terms of a tender into a formal contract see para 686 note 7 post.

11 See cases cited in note 9 supra.

12 See cases cited in note 9 supra. See also *Percival Ltd v LCC Asylums and Mental Deficiency Committee* (1918) 87 LJB 677.

13 *Islington Union v Bretnall and Cleland* (1907) 71 JP 407; *Percival Ltd v LCC Asylums and Mental Deficiency Committee* (1918) 87 LJB 677; *Miller v FA Sadd & Son Ltd* [1981] 3 All ER 265, DC.

## UPDATE

### 635 Tenders

NOTE 6--EEC Council Directive 93/38 replaced: European Parliament and EC Council Directive 2004/17 (OJ L134 20.4.2004 p 1) (amended by European Parliament and EC Council Directive 2009/81 (OJ L216, 20.8.2009, p 76)). SI 1996/2911 replaced by Utilities Contracts Regulations 2006, SI 2006/6 (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 643 et seq), which implement EC Parliament and Council Directive 2004/17).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/636. Auctions.

### 636. Auctions.

At auction sales, it is a long-established rule that prima facie the auctioneer's request for bids is a mere invitation to treat<sup>1</sup>, and that each bid constitutes an offer<sup>2</sup> which is accepted on behalf of the seller by the auctioneer when he signifies his acceptance in the usual manner<sup>3</sup>. It would seem, moreover, that each bid lapses as soon as a higher bid is made<sup>4</sup>, and that any bid may be withdrawn before the auctioneer's acceptance of it<sup>5</sup>. Generally, the sale of an interest in land can only be made in writing<sup>6</sup>, but this rule does not apply when the sale is conducted by public auction<sup>7</sup>.

A sale by auction may be expressly subject to a reserve price, or a right to bid on behalf of the seller<sup>8</sup>. Where this is so, there is no contract of sale if the auctioneer mistakenly accepts a bid lower than the reserve price<sup>9</sup>; and the seller may always withdraw the property before the reserve price has been reached<sup>10</sup>. Unless so notified, the sale is assumed to be without reserve<sup>11</sup>. Where, in a sale without reserve, the property is withdrawn after bidding has commenced, it seems likely that the highest bona fide bidder cannot claim that he has contracted to buy the property, but that he may be able to sue the seller or auctioneer under a collateral contract that the sale is to be without reserve<sup>12</sup>. In a sale without reservation of a right to bid, any bid on behalf of the seller will render the sale fraudulent<sup>13</sup>.

An advertisement that a sale by auction will be held is not an offer that binds the auctioneer to submit the advertised lots for sale<sup>14</sup>; but, on commencement of the bidding, the general rule<sup>15</sup> seems to be that there is an offer on the part of the auctioneer that he will, on the seller's behalf, accept the highest bona fide bid<sup>16</sup>.

1 See eg *British Car Auctions Ltd v Wright* [1972] 3 All ER 462 at 466, [1972] 1 WLR 1519 at 1524, DC, per Lord Widgery CJ.

2 As to disputes over bids see para 704 note 7 post.

3 *Payne v Cave* (1789) 3 Term Rep 148. This rule is given statutory form for some sales by the Sale of Goods Act 1979 s 57(2): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 745. As to acceptance see further para 654 post; and as to mistake see paras 633 note 10 ante, 703 et seq post.

4 *Blackbeard v Lindigren* (1786) 1 Cox Eq Cas 205 (highest bidder insane (as to which see para 649 post); held: next highest bidder was not the purchaser). It seems likely that the offer made by each bid is subject to the condition that it will lapse when a higher bid is made. If so, then on withdrawal of a bid, the auctioneer could not without more accept the next highest bid. As to the lapse of offers subject to conditions see para 647 post.

5 On revocation of an offer generally see para 644 post.

6 See para 624 ante.

7 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(5)(b); and SALE OF LAND. As to oral contracts for sales of interests in land see para 637 note 5 post.

8 *Howard v Castle* (1796) 6 Term Rep 642 at 645, obiter per Grose J. This rule is given statutory form for some sales by the Sale of Land by Auction Act 1867 s 5 (as amended); and the Sale of Goods Act 1979 s 57(3): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 745. See also AUCTION vol 2(3) (Reissue) para 242.

9 *McManus v Fortescue* [1907] 2 KB 1, CA: see further AUCTION.

10 This follows from *McManus v Fortescue* [1907] 2 KB 1, CA: see AUCTION vol 2(3) (Reissue) para 208. See also the Sale of Land by Auction Act 1867 s 6; and the Sale of Goods Act 1979 s 57(2), (3).

11 The auctioneer may still refuse to accept any bid: see *ibid* s 57(2); and see generally, as to rejection of offers, para 645 post. But if he does so, he may be liable for breach of warranty to the highest bona fide bidder: see note 12 *infra*. However, if the auctioneer accepts a bona fide bid below a secret reserve, it is likely that the auctioneer has apparent authority to conclude a contract of sale: see generally AUCTION.

12 See *Warlow v Harrison* (1859) 1 E & E 309; contra *Fenwick v Macdonald, Fraser & Co Ltd* (1904) 6 F 850, Ct of Sess; and see further AUCTION.

13 *Bexwell v Christie* (1776) 1 Cowp 395 at 396-397 per Lord Mansfield. This rule has been given statutory form for some sales by the Sale of Land by Auction Act 1867 ss 4, 5; and the Sale of Goods Act 1979 s 57(4),(5). Contra where a third party independently makes a fictitious bid: see AUCTION vol 2(3) (Reissue) para 244. As to the effect of the situation where there is an agreement between third parties not to bid at an auction see AUCTION vol 2(3) (Reissue) para 246.

14 *Harris v Nickerson* (1873) LR 8 QB 286; and see further AUCTION.

15 If there is a reserve price, any offer must be conditional until that price is reached; and, if the seller reserves the right to bid, the offer is merely to accept the highest bid.

16 See notes 12, 15 *supra*.

## **UPDATE**

### **636 Auctions**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/637. Sale of an interest in land.

### 637. Sale of an interest in land.

Where there are negotiations in respect of a sale of an interest in land<sup>1</sup>, the usual expectation of the parties is that there will be no contract prior to the formal exchange of contracts<sup>2</sup>; and it is customary to show this by expressly making any prior agreement 'subject to contract'<sup>3</sup>. Where such is the intention of the parties, the offer is made when the first party to do so signs and delivers the formal contract to the other<sup>4</sup>.

Even where the phrase 'subject to contract' is not used, any oral 'offers' and 'acceptances' will usually be construed as mere invitations to treat<sup>5</sup>; but the circumstances may lead to the inference that an offer was intended<sup>6</sup>. Again, written communications not made subject to contract may constitute offers<sup>7</sup>, perhaps as amounting to open contracts<sup>8</sup> or contracts by correspondence<sup>9</sup>; but they will not necessarily do so<sup>10</sup>.

1 Such contracts must be made in writing (see para 624 ante) unless the contract was made by auction (see para 636 ante).

2 *Eccles v Bryant* [1948] Ch 93 at 97, [1947] 2 All ER 865 at 866-867, CA, per Lord Greene MR; *Gibson v Manchester City Council* [1979] 1 All ER 972, [1979] 1 WLR 294, HL. The 'contracts' exchanged are two copies of the intended formal contract, which is usually based on, if not a verbatim copy of, one of the common standard forms: see further SALE OF LAND.

3 Agreements made 'subject to contract' are considered in para 671 post.

4 *Eccles v Bryant* [1948] Ch 93, [1947] 2 All ER 865, CA; *Smith v Mansi* [1962] 3 All ER 857, [1963] 1 WLR 26, CA. As to the situation where the same firm of solicitors acts for both sides see para 659 note 18 post.

5 The parties may impliedly make the agreement 'subject to contract': see para 671 post.

6 See eg *Law v Jones* [1974] Ch 112, [1973] 2 All ER 437, CA; *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, CA; *Steadman v Steadman* [1976] AC 536, [1974] 2 All ER 977, HL; *Tweddell v Henderson* [1975] 2 All ER 1096, [1975] 1 WLR 1496; *Daulia v Four Millbank Nominees Ltd* [1978] Ch 231, [1978] 2 All ER 557, CA.

7 See eg *Bigg v Boyd Gibbins Ltd* [1971] 2 All ER 183, [1971] 1 WLR 913, CA; *McKenzie v Hiscock* (1965) 54 WWR 163, 55 DLR (2d) 155, Sask CA.

8 An 'open contract' is one where only the barest outline is expressly agreed. Because of the requirement of certainty (as to which see para 672 post), it must as a minimum state the parties, the property, the consideration and the interest granted: *Harvey v Pratt* [1965] 2 All ER 786 at 788, [1965] 1 WLR 1025 at 1027, CA, per Lord Denning MR. However, it is possible for the parties to specify as much detail as they like, so that a contract can be partly formal and partly open. See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 82; SALE OF LAND.

9 See the Law of Property Act 1925 s 46; and the Statutory Form of Conditions of Sale 1925, SR & O 1925/779. These provisions amount to a statutory recognition of the inconveniences of the open contract. See further SALE OF LAND.

10 *Harvey v Facey* [1893] AC 552, PC; *Clifton v Palumbo* [1944] 2 All ER 497, CA; *Gibson v Manchester City Council* [1979] 1 All ER 972, [1979] 1 WLR 294, HL; *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114, [1987] 2 All ER 387, PC. See further paras 669, 671 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/638. Ticket contracts.

### 638. Ticket contracts.

Where a ticket is handed by one party to the other at about the time a contract is made between them, the manner in which the contract is made may depend on two factors; first, whether the ticket is intended to be a contractual document<sup>1</sup>; and second, the mode of its issue.

Where it is not obvious that the ticket is intended to be a contractual document<sup>2</sup>, it may be that the contract is formed entirely independently of the ticket<sup>3</sup>. On the other hand, it may be that the request for the ticket is an offer and the proffering of the ticket an acceptance<sup>4</sup>, although the acceptance may sometimes take place at a later stage<sup>5</sup>. Where the booking is made through a ticket (booking) agent, it may be that the customer makes the offer and the contract is made when the agent 'accepts' the booking<sup>6</sup> or issues the ticket<sup>7</sup>.

Where it is obvious that the ticket is intended to be a contractual document, the position will generally be that the proffering of the ticket by the issuing clerk will be an offer<sup>8</sup>, and the taking and retention of that ticket an acceptance<sup>9</sup>, though the acceptance may sometimes take place later<sup>10</sup>. In the case of a conductor-operated bus, it may be, however, that a 'temporary' contract is made once the passenger is 'bus-borne'<sup>11</sup>, and that this contract is subsequently varied when the passenger asks the conductor for, and is supplied by the latter with, a ticket to a nominated destination<sup>12</sup>. Further, where an automatic ticket-dispensing machine is involved, the 'proprietor of the machine'<sup>13</sup> probably makes the offer, in which case the placing of money in the slot is the acceptance<sup>14</sup>; but an alternative view is that the machine is 'a booking clerk in disguise', and that the placing of the money in the slot is the offer and the ejection of the ticket the acceptance<sup>15</sup>. Certainly, where there is an automated car park which provides for payment on exit, the contract is made when the motorist presents his vehicle at the automated entrance barrier<sup>16</sup>.

1 As to the presumption of intention to create legal relations in commercial agreements see para 720 post.

2 The classic test of when the writing on a ticket was to be regarded as part of a contract was laid down in *Parker v South Eastern Rly Co* (1877) 2 CPD 416 at 423, CA, per Mellish LJ.

3 See eg *Chapelton v Barry UDC* [1940] 1 KB 532, [1940] 1 All ER 356, CA; *Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd's Rep 257 (affd on other grounds [1980] 3 All ER 696, [1981] 1 WLR 120, CA). This analysis has also been used by the court when it felt that a ticket contained unreasonable terms that it wished to avoid: *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, [1988] 1 All ER 348, CA.

4 Eg usually in the case of raffle, cloakroom or cinema tickets.

5 See eg *Hollingworth v Southern Ferries Ltd* [1977] 2 Lloyd's Rep 70; *Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd's Rep 257 (affd on other grounds [1980] 3 All ER 696, [1981] 1 WLR 120, CA); *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 79 ALR 9, Aust HC; and see note 10 infra.

6 *Dillon v Baltic Shipping Co* [1991] 2 Lloyd's Rep 155 at 159, NSW SC.

7 It will frequently be a counter-offer because the ticket contains or refers to previously unmentioned exclusion clauses. As to counter-offers see para 663 post; as to exclusion clauses see para 797 et seq post.

8 See note 7 supra.

9 See eg *Parker v South Eastern Rly Co* (1877) 2 CPD 416, CA; *Nunan v Southern Rly Co* [1923] 2 KB 703; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA. Where a contract of carriage is booked by post or telephone, the contract may not be complete until the ticket has been received, whether or not it has

been paid for beforehand: *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450 at 461 per Streatfeild J; but see *Denton v Great Northern Rly Co* (1856) 5 E & B 860.

10 *MacRobertson-Miller Airline Services v Comr of State Taxation of State of Western Australia* [1975] 8 ALR 131 (when holder claimed the accommodation offered in the ticket); and see note 5 supra.

11 *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258 at 259, CA, obiter per Lord Greene MR. (It is not quite clear whether the Master of the Rolls considered the contract would be made when the passenger (1) put his foot on the bus; or (2) stood inside the bus. Presumably, on these analyses the bus travelling along the road is an offer by the bus company to carry passengers to places on the route specified on the indicator board; and the passenger is agreeing to pay at the ordinary rate for the number of fare stages travelled).

12 This analysis would not apply to one-man buses, where presumably a single contract to travel to an exact destination is expressly made with the driver-conductor, the passenger making the offer, and the driver-conductor accepting by issuing the ticket. Quaere whether the same analysis can apply to 'exact-fare one-man' buses.

13 This is the expression used by Lord Denning MR in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA, in the obiter dicta cited in note 14 infra; and no doubt was accurate in that case. It may well be, however, that the automatic machine is leased out, eg to a retailer, and that the contract is made between the hirer of the machine and his customer.

14 *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169, [1971] 1 All ER 686 at 689, CA, obiter per Lord Denning MR. As to acceptance by conduct see para 657 post.

15 *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169, [1971] 1 All ER 686 at 689, CA, obiter per Lord Denning MR. The other two members of the Court of Appeal refused to commit themselves on this issue: see at 170 and 690 per Megaw LJ and at 174 and 693 per Sir Gordon Willmer.

16 *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/639. Offers to the world at large.

### **639. Offers to the world at large.**

Whilst an offer must be made by a definite person or group of persons<sup>1</sup>, it may be made to the world at large<sup>2</sup>. The offer may from its nature be susceptible of only one acceptance<sup>3</sup>; or the number of acceptances may be expressly or impliedly limited<sup>4</sup>; or the offer may evince an intention that a single consideration be shared between an indefinite number of acceptors<sup>5</sup>; or it may be possible for an indefinite number of persons each to earn the stipulated consideration<sup>6</sup>. The offer may be to enter into a unilateral or a bilateral contract<sup>7</sup>.

An advertisement which envisages that the advertiser will enter into unilateral contracts will usually be found to have amounted to an offer. Thus, an advertisement of a reward to be paid to any person who performs a certain act is an offer to the world at large, and can be accepted by anyone who performs that act<sup>8</sup>; the specified act may, for instance, be the giving of certain specified information<sup>9</sup>; the return of certain property to the advertiser<sup>10</sup>; the use of a specified medicament<sup>11</sup>; the purchase of a particular product<sup>12</sup>; or volunteering for military service<sup>13</sup>.

However, advertisements which envisage that the advertiser will enter into bilateral contracts are more often found to be invitations to treat. For instance, the following have been held to be mere invitations to treat: a newspaper advertisement of goods for sale generally<sup>14</sup>, or by tender<sup>15</sup>; goods in a shop window for sale<sup>16</sup>; a prospectus inviting the public to take up shares<sup>17</sup>; an advertisement of intention to hold an auction<sup>18</sup>, or a scholarship examination<sup>19</sup>, or a competition<sup>20</sup>. On the other hand, the following have been held to constitute offers by a carrier: his publication of a time-table<sup>21</sup>; or the running of buses<sup>22</sup>.

In addition to the above civil liability, an advertisement aimed at consumers may also give rise to criminal liability, whether or not it amounts to an offer<sup>23</sup>.

1 Otherwise there will be insufficient certainty for the 'agreement' to be enforced: see para 605 ante.

2 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 268, CA, per Bowen LJ.

3 Eg the offer of a reward for the return of a lost dog. But two or more persons might perform that act jointly: see note 5 infra.

4 See eg *Lancaster v Walsh* (1838) 4 M & W 16 (held: reward impliedly limited to first person to give information). As to conditional agreements see generally para 670 post.

5 See eg *Lockhart v Barnard* (1845) 14 M & W 674 (two persons together supplying required information; held: jointly entitled to single reward).

6 See eg *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA (user of smoke ball entitled to reward on catching influenza); *Eso Petroleum Co Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, HL (purchasers of petrol entitled to obtain special coins); *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC (offer of a consignor of goods by way of bill of lading of immunity to any independent contractor who helps in the transportation process).

7 As to the distinction between unilateral and bilateral contracts see generally para 606 ante.

8 As to the position where an offeree has begun but not yet completed performance of the requested act see para 657 post. The possibility of an offer to enter a unilateral contract being acceptable by a large variety of acts has been approved: *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC.

9 Eg an offer of reward for information leading to conviction of a criminal: *Williams v Carwardine* (1833) 4 B & Ad 621; *Lancaster v Walsh* (1838) 4 M & W 16; *Lockhart v Barnard* (1845) 14 M & W 674; *Gibbons v Proctor* (1891) 64 LT 594. And see the cases cited in para 657 note 2 post.

10 See eg *McMahon v Gilberd & Co Ltd* [1955] NZLR 1206, NZ CA (bottles stamped '3d deposit'; held: offer to retail purchasers for return of empties).

11 See eg *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA.

12 See eg *Esso Petroleum Co Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, HL.

13 See eg see the cases cited in para 634 note 6 ante.

14 See eg *Partridge v Crittenden* [1968] 2 All ER 421, [1968] 1 WLR 1204, DC. Contrast *Lefkowitz v Great Minneapolis Surplus Stores Inc* (1957) 251 Minn 188, 86 NW 2d 689 (1957).

15 See eg the case cited in para 635 note 8 ante.

16 See eg the cases cited in para 634 note 13 ante. See also the cases in respect of goods on a shelf in a self-service store cited in para 634 note 14 ante.

17 See eg the case cited in para 634 note 17 ante.

18 See eg the case cited in para 636 note 14 ante.

19 See eg the case cited in para 634 note 5 ante.

20 Eg entries for a yacht race: see the cases in para 631 note 1 ante. See also *Hawrysh v St John's Sportsmen's Club* (1964) 49 WWR 243, 46 DLR (2d) 45, Man QB (ten-pin bowling competition).

21 See eg para 634 note 7 ante.

22 See eg *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258 at 259, CA, obiter per Lord Greene MR.

23 See the Trade Descriptions Act 1968 s 14(1)(b); the Consumer Protection Act 1987 s 20; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 495, 702. See also the Consumer Credit Act 1974 ss 45, 46; and CONSUMER CREDIT vol 9(1) (Reissue) para 150.

## UPDATE

### 639-640 Offers to the world at large , Options

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### 639 Offers to the world at large

TEXT AND NOTE 23--Trade Descriptions Act 1968 s 14, Consumer Credit Act 1974 s 46, and Consumer Protection Act 1987 s 20 repealed: SI 2008/1277. Provision for made for the prohibition of unfair commercial practices by the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277; see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 725A.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/640. Options.

#### 640. Options.

A contract of option<sup>1</sup> is one whereby the grantor of the option offers<sup>2</sup> to enter into what may be called a 'major' contract with a second person and makes a separate contract to keep his offer open<sup>3</sup>. Usually<sup>4</sup>, but not necessarily<sup>5</sup>, the person to whom the grantor of the option binds himself to keep the offer open is that second person, who may be conveniently referred to as the 'option-holder'. The contract of option may make it possible for the rights of the option-holder to be assigned<sup>6</sup>.

The contract of option may be unilateral or bilateral<sup>7</sup>. It may exist either as a separate option contract<sup>8</sup>, or as part of a larger contract such as one of the following: a lease with an option in the lessee (of land) to renew the lease<sup>9</sup> or buy the reversion<sup>10</sup>; a hire-purchase agreement<sup>11</sup>; a sale with an option of repurchase granted to either the seller<sup>12</sup> or the buyer<sup>13</sup>; a sale with an option for the buyer to make further purchases on similar terms<sup>14</sup>; a service or agency agreement with an option in either party to renew<sup>15</sup>. Certain contracts of option have been made void<sup>16</sup> or illegal<sup>17</sup> by statute.

With regard to the envisaged major contract, the effect of the contract of option is to create an irrevocable offer<sup>18</sup> and a power of acceptance<sup>19</sup>. The offer is irrevocable<sup>20</sup> in the sense that it is a breach of the contract of option to revoke it<sup>21</sup>, and its effect is to create a power of acceptance in the option-holder<sup>22</sup> good against the grantor of the option<sup>23</sup> and sometimes also against third parties<sup>24</sup>. Thus the grantor of the option is under a conditional duty, and the option-holder has a conditional right, of performance of the option offer, that condition being the exercise of the power of acceptance by the option-holder<sup>25</sup>; as the envisaged major contract may be bilateral or unilateral<sup>26</sup>, that condition may be an acceptance<sup>27</sup> or another act<sup>28</sup> by the option-holder. Furthermore, the exercise of the option may itself be subject to certain conditions precedent, such as a time limit<sup>29</sup>, or the occurrence of a certain event<sup>30</sup>, or the duration of a major contract of which it forms a part<sup>31</sup>, or the mode in which it may be exercised<sup>32</sup>. An option may terminate on the occurrence of a condition subsequent<sup>33</sup>.

1 The contract of option must be distinguished from the following: (1) the option to accept or reject an offer (see para 650 et seq post); (2) a contract subject to a condition precedent, eg *Re Longlands Farm, Long Common, Botley, Hants, Alford v Superior Developments Ltd* [1968] 3 All ER 552 (see para 670 post); (3) a contract providing one party with the option of alternative performance (as to the right of alternative performance see para 925 post; as to alternative modes of acceptance see para 658 post); (4) the option to perform, break, or terminate a contract (for discharge by performance see para 921 post; as to the effect of breach of contract see para 989 post; as to the right of specific performance see para 1012 post; as to termination see eg *Head v Tattersall* (1871) LR 7 Exch 7; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, HL (and see paras 982-984 post)); (5) a right of first refusal (see para 641 post: see also *Woodroffe v Box* [1954] ALR 474, 28 ALJ 90, Aust HC, where first refusal was held to create an option); (6) a contract of agency (see *Livingstone v Ross* [1901] AC 327, PC; *Kelly v Enderton* [1913] AC 191, PC: see further AGENCY vol 1 (2008) PARA 14 et seq); (7) a right to waive a provision wholly in one person's favour (see *Earl v Mawson* (1973) 228 Estates Gazette 529 at 533 per Walton J (affd (1974) 232 Estates Gazette 1315, CA); as to waiver see para 1025 et seq post); (8) a rent review clause (see eg *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 292 et seq).

2 As to offers see para 632 ante. The courts have experienced some difficulty where the offer has been expressed to be for a consideration to be agreed: see *Loftus v Roberts* (1902) 18 TLR 532, CA; *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426; *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505; *Trustees of National Deposit Friendly Society v Beatties of London Ltd* [1985] 2 EGLR 59. As to incomplete agreements see generally para 667 post; and in relation to pre-emption agreements see para 641 note 3 post.

3 I.e. a promise by deed (see para 621 ante) or for valuable consideration (see *Varty v British South Africa Co* [1965] Ch 508 at 522, [1964] 2 All ER 975 at 981, CA, obiter per Diplock LJ (revsd on other grounds [1966] AC

381, [1965] 2 All ER 395, HL); *Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674 at 691-692, Aust HC, per Isaacs J); or perhaps under the doctrine of equitable estoppel (see *Watson v Canada Permanent Trust Co* (1972) 27 DLR (3d) 735, BC SC; and para 1030 et seq post). It is a matter of interpretation whether or not the 'price' of the option forms part of the consideration for the major contract; as to part payments see generally para 942 post. Cf options to purchase in wills: *Earl of Radnor v Shafte* (1805) 11 Ves 448; and see WILLS vol 50 (2005 Reissue) paras 468-469. See also *Richards v Creighton Griffiths (Investments) Ltd* (1972) 225 Estates Gazette 2104 (option agreement requiring to be evidenced in writing cannot be varied orally).

The expression 'major contract' is inapposite in that exceptional case where the contract to keep the offer open is the major one: see eg *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC (consignor's offer of immunity for the negligent damage of goods by way of bill of lading to any independent contractor who assisted in the transportation process. The Privy Council explained the decision by way of agency principles).

4 See eg the cases cited in notes 2-3 supra, and notes 6-7, 10-11, 13-15, 27 infra.

5 See eg *Stromdale and Ball Ltd v Burden* [1952] 1 Ch 223, [1952] 1 All ER 59 (but the offeree was a party to the deed granting the option); *Woodroffe v Box* [1954] ALR 474, 28 ALJ 90, Aust HC (one of the joint offerees not a party to the deed); and see *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC. This may give rise to privity problems: see para 748 et seq post.

6 See eg *Whiteley Ltd v Hilt* [1918] 2 KB 808, CA (hire-purchase agreement); *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1961] 1 WLR 549 (affd on other grounds [1961] Ch 105, [1961] 1 All ER 90, CA) (lease of land). It is common for an option in a lease of land to be assignable on terms, but uncommon in respect of the option in a hire-purchase agreement. See also *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, [1975] 2 All ER 105, CA; *Roberts v Independent Publishers Ltd* [1974] 1 NZLR 459, CA. As to assignment see para 757 post.

7 See eg *Rural Municipality of St James v Bailey and Driscoll* (1957) 21 WWR 1, 7 DLR (2d) 179, Man CA (unilateral); *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505 (bilateral). As to the distinction between unilateral and bilateral contracts see generally para 606 ante.

8 See eg *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA; *Bell v Hobbs* [1956] NZLR 1005, NZ SC; *Sawley Agency Ltd v Ginter* (1966) 57 WWR 561, 58 DLR (2d) 757, BC CA.

9 See eg *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1961] 1 WLR 549 (affd on other grounds [1961] Ch 105, [1961] 1 All ER 90, CA); *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505. As to the statutory right to renew a lease see eg the Leasehold Reform Act 1967 ss 14-16 (as amended) (dwelling-houses) (see LANDLORD AND TENANT vol 27(3) (2006 Reissue) para 1469 et seq); the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (business premises) (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 706).

10 See eg *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415; *Griffith v Pelton* [1958] Ch 205, [1957] 3 All ER 75, CA; *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL. As to the statutory right of certain tenants to acquire the freehold of a house see eg the Leasehold Reform Act 1967 ss 8-13 (as amended); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) para 1439 et seq.

11 See eg *Helby v Matthews* [1895] AC 471, HL. See also CONSUMER CREDIT.

12 See eg *Du Sautoy v Symes* [1967] Ch 1146, [1967] 1 All ER 25. Cf *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA.

13 See eg *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, [1968] 1 WLR 74, CA.

14 See eg *Hilder v Dexter* [1902] AC 474, HL; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, HL. Cf *Delmas Milling Co v Du Plessis* 1955 (3) SA 447.

15 See eg *Loftus v Roberts* (1902) 18 TLR 532, CA; *General Publicity Services Ltd v Teign Hotel Ltd* [1951] WN 587, CA. As to the taxation provisions in respect of stock options granted to employees see the Income and Corporation Taxes Act 1988 ss 135-140 (as amended); and INCOME TAXATION vol 23(1) (Reissue) para 674 et seq.

16 Eg an unregistered option to purchase a legal estate (which is void against certain people in certain circumstances: see the Land Charges Act 1972 s 2(4) Class C(iv) (as amended)); prospective regulated agreements (see the Consumer Credit Act 1974 s 59(1); and CONSUMER CREDIT para 159 ante).

17 Eg hire-purchase agreements without the required minimum deposit: see the Emergency Laws (Re-enactments and Repeals) Act 1964 s 13; and CONSUMER CREDIT. As to contracts rendered illegal by statute see para 870 et seq post.

18 *Stromdale and Ball Ltd v Burden* [1952] Ch 223 at 235, [1952] 1 All ER 59 at 65 per Danckwerts J; *Mountford v Scott* [1975] Ch 258, [1975] 1 All ER 198, CA. As to criticism of the expression 'irrevocable offer' see *Varty v British South Africa Co* [1965] Ch 508 at 523, [1964] 2 All ER 975 at 982, CA, per Diplock LJ (revsd on other grounds [1966] AC 381, [1965] 2 All ER 395, HL). As to revocation of offer see generally para 644 post. As to interests in land see note 19 infra.

19 *Varty v British South Africa Co* [1965] Ch 508 at 523, [1964] 2 All ER 975 at 982, CA, per Diplock LJ (revsd on other grounds [1966] AC 381, [1965] 2 All ER 395, HL); *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC.

The grant of an option to buy land is a 'sale or other disposition of an interest in land' within the meaning of the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1) (see REAL PROPERTY), and must usually be made in writing (see para 624 ante); but a notice exercising such an option need not be (*Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600).

20 Except as provided in its own terms for conditional options: see the text to notes 29-32 infra.

21 However, unless that contract is specifically enforceable (as to specific performance see para 1012 post), the offer is revocable in the sense that the grantor of the option may pay damages in lieu of performance (as to damages for breach see para 1012 post). As to the offeror's power to revoke an offer generally see para 644 post.

22 Or his assignee, eg *County Hotel and Wine Co Ltd v London and North Western Rly Co* [1919] 2 KB 29, CA (affd [1921] 1 AC 85, HL) (this option failed for uncertainty: see para 672 note 18 post); *Baker v Merckel* [1960] 1 QB 657, [1960] 1 All ER 668, CA. As to assignment generally see CHOSER IN ACTION vol 13 (2009) PARA 13 et seq.

23 *Westway Homes Ltd v Moores* [1991] 2 EGLR 193, CA. See also the cases cited in note 14 supra. As to the mode in which the option may be exercised see generally para 653 post. As to the curing of uncertainty in the terms of the major contract see *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 43 ALR 68, Aust HC.

24 Generally, the contract of option will not give the option-holder rights in the subject matter of the option which are good against third parties because of the doctrine of privity: see para 748 et seq post. However, options to purchase an interest in land normally create an equitable interest in land (*Mountford v Scott* [1975] Ch 258, [1975] 1 All ER 198, CA) which may be good even against a bona fide purchaser without notice; but their effectiveness depends on the operation of the doctrine of notice, and in particular on the following provisions: (1) the Land Charges Act 1972 in respect of unregistered land: see *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1961] 1 WLR 549 (affd on other grounds [1961] Ch 105, [1961] 1 All ER 90, CA); and see SALE OF LAND; and (2) the Land Registration Act 1925 in respect of registered land: see ss 70(1)(g), 107(1); and LAND REGISTRATION. Moreover, an option contained in a lease to renew a lease is enforceable at common law against an assignee of the reversion under the doctrine of privity of estate: see *Isteed v Stoneley* (1580) 1 And 82; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 139. As to whether a similar covenant would run with property other than realty see para 750 post. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION.

25 See eg *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA (see further note 32 infra); *Yates Building Co v RJ Pulleyn & (York) Sons* [1976] 1 EGLR 157, CA; *Oliver v Oliver* [1958] ALR 609, 32 ALJR 198, Aust HC; *Rural Municipality of St James v Bailey and Driscoll* (1957) 21 WWR 1, 7 DLR (2d) 179, Man CA. As to counter-offers by the option-holder see para 663 notes 19-20 post.

An election not to exercise an option may be binding as a waiver: see *Marseille Fret SA v D Oltmann Schiffahrts GmbH & Co KG, The Trado* [1982] 1 Lloyd's Rep 157; and para 1025 et seq post.

26 See eg *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, [1968] 1 WLR 74, CA (bilateral); *Lord Ranelagh v Melton* (1864) 2 Drew & Sm 278 (unilateral). See also *Baker v Merckel* [1960] 1 QB 657, [1960] 1 All ER 668, CA.

27 *Bruner v Moore* [1904] 1 Ch 305 (option to purchase patent exercised on posting letter and sending telegram); distinguished in *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA (see note 28 infra); *Nicholson v Smith* (1882) 22 ChD 640 (lease with option to renew by notice before expiry of term); and see further LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 539; *Westway Homes Ltd v Moores* [1991] 2 EGLR 193, CA (notation on notice 'subject to contract' ignored). As to acceptance of offers see generally para 650 et seq post.

28 Eg by actual delivery of a posted letter of acceptance (*Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA); by tender of the price where the major contract is one of sale (*Kessler v Pruitt* 14 Idaho 175, 93 P 965 (1908)). As to mode of acceptance and tender of payment see respectively paras 653, 676, 971 et seq post. If the grantor of the option makes performance of the act impossible, he will be in breach of the contract of option: see generally para 786 post. In the case of an option to purchase an interest in land, the terms of the Law of Property Act 1925 s 196 may require that a posted letter exercising the option be delivered before it is effective: see *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 152.

29 See eg the cases cited in notes 8, 26 supra; *Dibbins v Dibbins* [1896] 2 Ch 348; *General Publicity Services Ltd v Teign Hotel Ltd* [1951] WN 587, CA; *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL. See further para 933 post.

30 See eg *Denny Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, [1944] 1 All ER 678, HL (if contract for sale of timber terminated by notice); *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, [1968] 1 WLR 74, CA (if hire-purchase agreement should be terminated); *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA (outliving grantor). As to conditional covenants for the renewal of leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 538 et seq.

But see *Little v Courage Ltd* (1994) 70 P & CR 469, CA (grantor's requirement of a business plan and a new agreement was not a condition precedent where the grantor subsequently decided that they were unnecessary).

31 See eg *Longmuir v Kew* [1960] 3 All ER 26, [1960] 1 WLR 862 (option in lease to purchase reversion at any time; held: at any time during currency of tenancy); *Kennedy and Shaw v Beaucage Mines Ltd and Canadian Bank of Commerce* [1959] OR 625, 20 DLR (2d) 1, Ont CA.

32 *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA (the condition read 'by notice in writing to the intending vendor at any time within six months from the date hereof'. It was held that there was no sale of land where the posted acceptance never arrived). See also *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421 (options to purchase shares on the Stock Exchange must be exercised according to the Stock Exchange Rules); *Bowman & IH Bowman Pty Ltd v Durham Holdings* (1973) 2 ALR 193, Aust HC.

Distinguish where the condition is only of completion, not of exercise of the option: *Eyre Construction Ltd v Scott* (1973) 229 Estates Gazette 259 (six months' notice 'as you take up parcels'); *Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422 (payment of a deposit).

33 *Thompson v ASDA-MFI Group plc* [1988] Ch 241, [1988] 2 All ER 722 (employee group share option). As to conditions subsequent see para 962 post.

## UPDATE

### 639-640 Offers to the world at large, Options

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### 640 Options

NOTE 3--See *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] EWCA Civ 58, [2007] 2 All ER (Comm) 756.

NOTE 15--Income and Corporation Taxes Act 1988 ss 135-137, 140 replaced by provisions of the Income Tax (Earnings and Pensions) Act 2003. For destination of replaced provisions, see table, INCOME TAXATION vol 23(2) (Reissue) PARA 1900A.

NOTE 24--Land Registration Act 1925 replaced by Land Registration Act 2002: see LAND REGISTRATION.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/641. First refusals.

### 641. First refusals.

Similar to the contract of option<sup>1</sup> is the contract of 'first refusal' or 'pre-emption'<sup>2</sup>, whereby one person (A) enters into a contract with a second person (B) which provides that if A contemplates entering into a certain defined<sup>3</sup> contract or type of contract with anyone, he will first offer to do so with B. That type of contract differs from the contract of option in that A has made no positive offer<sup>4</sup>; his duty will usually be the purely negative one of not contracting with any third person (C) in the defined respect unless and until he has first offered to do so with B<sup>5</sup>, though that offer may be conditional<sup>6</sup> or assignable<sup>7</sup>; but it is conceivable that his duty may merely be that, if he does so contract with C, he will make that contract subject to B's right of first refusal<sup>8</sup>. Where A in breach of the first refusal contract sells to C, it may be that the first refusal becomes an option<sup>9</sup>.

There may be a contract of option and first refusal, whereby B is given an option and a right of first refusal<sup>10</sup>; or where B is granted an option in return for his granting A a right of first refusal<sup>11</sup>. Similarly, there may be a contract of double option where each grants the other an option on the happening of a certain event<sup>12</sup>.

A difficulty with contracts of first refusal is whether the parties have completed their negotiations and have reached an agreement; if not, there may be no binding contract, merely an agreement to negotiate<sup>13</sup>. On the other hand, there may be a binding provisional<sup>14</sup> or conditional<sup>15</sup> agreement; or a binding collateral agreement not to negotiate with a third party (a 'lock-out agreement')<sup>16</sup>. Where the parties have not completed their negotiations, it seems that a binding 'lock-out' agreement cannot be created by implying a term that A will continue to negotiate with B in good faith<sup>17</sup>; but it may be that an express agreement to use best endeavours to conclude a contract with B is binding<sup>18</sup>, whereas there can be no contract on the basis of such an implied term<sup>19</sup>.

1 As to contracts of option see para 640 ante.

2 See eg *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37, CA; *Ryan v Thomas* (1911) 55 Sol Jo 364; *Du Sautoy v Symes* [1967] Ch 1146, [1967] 1 All ER 25; *Gardner v Coutts & Co* [1967] 3 All ER 1064, [1968] 1 WLR 173; *Smith v Morgan* [1971] 2 All ER 1500, [1971] 1 WLR 803; *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA; *Alphenstow Ltd v Regalian Properties plc* [1985] 2 All ER 545, [1985] 1 WLR 721.

The term 'first refusal' is not a term of art, and a clause so expressed may be construed to create a contract of option (*Woodroffe v Box* [1954] ALR 474, 28 ALJ 90, Aust HC). Similarly, an 'option' may amount to a right of first refusal (*Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101).

3 The fact that the right of pre-emption is expressed to be 'at a figure to be agreed upon' is not necessarily fatal: see *Smith v Morgan* [1971] 2 All ER 1500, [1971] 1 WLR 803. Compare the similar problem in respect of contracts of option: see para 640 note 2 ante; and as to incomplete agreements see generally para 667 post.

4 It is therefore doubtful whether the right of pre-emption creates an interest in land: *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37 at 50-51, CA, per Vaughan Williams LJ. Compare the position in respect of contracts of option: see para 640 ante.

5 *Greene v Church Comrs for England* [1974] Ch 467, [1974] 3 All ER 609, CA; *Churchman v Lampon* [1990] 1 EGLR 211. The first person cannot defeat the right of pre-emption by giving away the subject matter of that right: *Gardner v Coutts & Co* [1967] 3 All ER 1064, [1968] 1 WLR 173. Nor may he offer the property at a certain price, and, on refusal by the second person, sell to a third at a lower price: *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37, CA.

6 *Churchman v Lampon* [1990] 1 EGLR 211; *Rolling v Willann Investments Ltd* (1989) 70 OR (2d) 578, Ont CA.

- 7 *Sampson v Caldwell* [1977] 1 EGLR 100.
- 8 See eg *Capitol Land Co v Zorn* 184 NE 2d 152 (Ind App 1962).
- 9 *Kling v Keston Properties Ltd* (1985) 49 P & CR 212.
- 10 See eg *Du Sautoy v Symes* [1967] Ch 1146, [1967] 1 All ER 25.
- 11 See eg *Vickrey v Maier* 164 Cal 384, 129 P 273 (USA 1913).
- 12 See eg *Smitton v McCullough* 182 Cal 530, 189 P 686 (USA 1920).
- 13 *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297, CA. See para 667 post.
- 14 *Donwin Productions Ltd v EMI Films Ltd* (1984) Times, 9 March; and see para 669 post.
- 15 See para 670 post.
- 16 *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961, [1994] 1 WLR 327, CA; *Tye v House* [1997] 2 EGLR 171 (where it was termed an 'exclusivity agreement'); and see paras 669, 671, 731 post.
- 17 *Walford v Miles* [1992] 2 AC 128, [1992] 1 All ER 453, HL (D sold to TP for price at which negotiating to sell to P). As to 'lock-out' provisions in labour agreements see para 672 note 11 post.
- 18 *Channel Home Centers Division of Grace Retail Corp v Grossman* 795 F 2d 291 (1986). However, it has been observed that the court there proceeded on the basis 'that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and, as the latter is enforceable, so is the former'; that that view is 'unsustainable'; but that 'the same does not apply to an agreement to use best endeavours': *Walford v Miles* [1992] 2 AC 128 at 138, [1992] 1 All ER 453 at 460, HL, per Lord Ackner; and see *Lambert v HTV Cymru (Wales) Ltd* (1988) Times, 17 March, CA.
- 19 *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1981] 2 Lloyd's Rep 425 at 432 (affd without reference to this point [1983] 2 AC 694, HL); cited with approval in *Walford v Miles* [1992] 2 AC 128 at 137, [1992] 1 All ER 453 at 460, HL.

## UPDATE

### 641 First refusals

NOTE 13--See *Wellington CC v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486, NZCA (on facts, contract to negotiate unenforceable since there was no clear picture of either party's obligations other than general acceptance that negotiations would be in good faith).

NOTE 18--*Lambert v HTV Cymru (Wales) Ltd*, cited, reported at [1998] EMLR 629.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/642. Communication of offer.

#### **642. Communication of offer.**

It is probably a safe general rule that an offer should be communicated to the other party in order that its acceptance may constitute a contract<sup>1</sup>. Thus, the unauthorised publication in the press of a resolution of a corporation that any employee of the corporation volunteering for military service should receive, during such service, the difference between his army pay and the salary he received in its employment, does not constitute communication<sup>2</sup>. It would also follow that there could be no acceptance in ignorance of the offer<sup>3</sup>.

Particular difficulties have arisen with regard to communications by letter or telegram. By a well settled exception to the general rule that acceptance is only effective upon its communication<sup>4</sup>, letters of acceptance sent by post operate as acceptances from the time of posting<sup>5</sup>. It has been said that the same is true of offers sent by post<sup>6</sup>, but it may be that, for the purposes of formation of contract, the offer is better regarded as being made on receipt by the offeree<sup>7</sup>.

1 *Raeburn and Verel v Burness & Sons* (1895) 1 Com Cas 22; *Morrison Shipping Co Ltd v R* (1925) 20 Ll L Rep 283 at 285, HL, obiter per Viscount Cave LC. But see *Wiles v Maddison* [1943] 1 All ER 315 at 317, DC, per Viscount Caldicote LC: '... before it can be said that anybody has made an offer, some evidence must be available to show that the offer was communicated or put on its way. I do not say that it must be proved that the offer has reached the person to whom the offer is made'. That case, however, was concerned with the prosecution of the defendant for making an offer; and it does not follow that, if the defendant had done enough to commit the offence by putting the offer on its way, the offer had therefore been made so as to be capable of acceptance.

2 *Wilson v Belfast Corpn* (1921) 55 ILT 205. Presumably, it should be sufficient if the publication were apparently authorised; cf para 659 note 16 post.

3 See para 665 post.

4 See para 659 post.

5 See para 676 post.

6 *Taylor v Jones* (1875) 1 CPD 87 at 90, obiter per Lord Coleridge CJ. In the nineteenth century the view was held that offers sent by post were continuing offers, ie they should be regarded as being made during every instant that the letters were being carried by the Post Office from the offerors to the offerees: see eg *Adams v Lindsell* (1818) 1 B & Ald 681 at 683, obiter; *Newcomb v De Roos* (1859) 2 E & E 271; *Evans v Nicholson* (2) (1875) 32 LT 778; *Taylor v Jones* supra; *Bennett v Cosgriff* (1878) 38 LT 177, DC. All these cases, other than *Adams v Lindsell* supra, were, however, concerned with jurisdictional issues; but the view taken in the nineteenth century may help to explain certain difficult cases, eg (1) cross-offers sent by post; (2) offers of reward accepted in ignorance of the offer: see further para 665 post.

7 *Caldwell v Cline* 109 W Va 553, 156 SE 55 (USA 1930), citing the following obiter dicta from *Bennett v Cosgriff* (1878) 38 LT 177 at 178, DC, per Lindley J: 'a letter is a continuing offer, or order, or statement by the sender, which takes effect in the place where the person to whom it is sent receives it'. See also Williston *Law of Contracts* (4th Edn) s 4.15.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/643. Duration of offer.

**643. Duration of offer.**

An offer may be terminated by any of the following events: (1) revocation by the offeror<sup>1</sup>; (2) rejection by the offeree<sup>2</sup>; (3) lapse of time<sup>3</sup>; (4) occurrence of a terminating condition<sup>4</sup>; (5) death<sup>5</sup>; (6) insanity, incapacity, insolvency or impossibility<sup>6</sup>.

1 See para 644 post.

2 See para 645 post.

3 See para 646 post.

4 See para 647 post.

5 See para 648 post.

6 See para 649 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/644. Revocation by offeror.

#### **644. Revocation by offeror.**

An offer may generally be revoked at any time before it has been accepted<sup>1</sup>, provided that the revocation is communicated to the offeree<sup>2</sup>. This is so even though the offeror has indicated that he will keep his offer open for a specified time<sup>3</sup>. Where, however, the offeror has contracted to keep his offer open, revocation of that offer will amount to a breach of the contract of option<sup>4</sup>. An offer cannot be revoked after acceptance<sup>5</sup>.

An unaccepted offer will be revoked when the offeror (or his agent<sup>6</sup>) communicates<sup>7</sup> to the offeree<sup>8</sup>, in any manner<sup>9</sup>, his unequivocal<sup>10</sup> intention to revoke the offer either expressly<sup>11</sup> or impliedly<sup>12</sup>. However, an offer may also be revoked without such a direct communication by the offeror to the offeree. First, where an offer is made to all the world<sup>13</sup>, it may be revoked by giving the same notoriety to the revocation as to the offer<sup>14</sup>. Secondly, any offer will be revoked where the offeree receives reliable information from any third person<sup>15</sup> that the offeror no longer intends to contract with him<sup>16</sup>. Thirdly, whilst an offer normally cannot be revoked merely by the offeror acting inconsistently with it<sup>17</sup>, it can be brought to an end by a terminating condition<sup>18</sup>. Fourthly, where an offer is made to a large organisation, it may be that the offer is revoked when that revocation is opened in the ordinary course of business<sup>19</sup>. Fifthly, the offeree may be estopped from denying receipt of revocation<sup>20</sup>.

An offer to enter into a unilateral contract<sup>21</sup> is generally subject to all the above rules; it may be revoked at any time before the offeree commences the requested act of acceptance<sup>22</sup> and it cannot be revoked after the offeree has completed that act<sup>23</sup>. The position is more doubtful, however, where the offeree has commenced but not completed the requested act of acceptance at the time when the offeror purports to revoke. On one view, the offer remains revocable until the requested act has been completed<sup>24</sup>; on a second view, the offeror becomes bound once the offeree unequivocally commences performance, either because that commencement constitutes an acceptance<sup>25</sup> (though not a performance<sup>26</sup>), or because there is an implied collateral contract to keep the offer open<sup>27</sup>; whereas on a third view, there is an implied promise to pay on a quantum meruit basis for the proportion of the requested act completed at the time of revocation<sup>28</sup>.

1 *Payne v Cave* (1789) 3 Term Rep 148; *Routledge v Grant* (1828) 4 Bing 653; *Meynell v Surtees* (1855) 25 LJ Ch 257; *Gilkes v Leonino* (1858) 4 CBNS 485; *Offord v Davies* (1862) 12 CBNS 748; *Holmes v Morris* (1863) 9 LT 393; *Hebb's Case* (1867) LR 4 Eq 9; *Dickinson v Dodds* (1876) 2 ChD 463, CA; *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA. As to acceptance see para 650 et seq post. As to international sales see para 684 post.

2 See the text to notes 6-12 infra; but for withdrawal of an offer to enter a regulated agreement see the Consumer Credit Act 1974 s 69(1)(ii), (7); and CONSUMER CREDIT para 185 ante.

3 *Cooke v Oxley* (1790) 3 Term Rep 653; *Routledge v Grant* (1828) 4 Bing 653; *Head v Diggon* (1828) 3 Man & Ry KB 97; *Dickinson v Dodds* (1876) 2 ChD 463, CA; *Bristol, Cardiff and Swansea Aerated Bread Co v Maggs* (1890) 44 ChD 616. A continuing guarantee, not made by deed, for future advances to be made to a third person, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on, and as to further or future transactions may be terminated at any time unless the contrary be expressly stipulated: *Offord v Davies* (1862) 12 CBNS 748; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 737; and see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1025. As to letters of credit see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 923 et seq. Similarly where the offer is accompanied by a deposit: *Fraser and Fraser v Morrison and Morrison* (1958) 25 WWR 326, 12 DLR (2d) 612, Man CA. As to offers for the international sale of goods within the Uniform Laws on International Sales Act 1967 s 2, Sch 2 art 5(2) see, however, paras 629 note 5 ante, 684 post.

4 See para 640 ante.

5 *Byrne & Co v Van Tienhoven & Co* (1880) 5 CPD 344; and see para 650 post. There is the same rule for international sales: see para 684 post.

6 Revocation by the offeror's agent amounts in law to revocation by the offeror: see eg *Gilkes v Leonino* (1858) 4 CBNS 485; *Henthorn v Fraser* [1892] 2 Ch 27, CA.

7 It has been said that the revocation must be 'brought to the mind of' the offeree: *Henthorn v Fraser* [1892] 2 Ch 27 at 32, CA, per Lord Herschell. Presumably, this means the mind of the offeree or such of his agents as are empowered to receive contractual communication; cf *Curtice v London City and Midland Bank Ltd* [1908] 1 KB 293 at 300-301, CA, per Fletcher Moulton LJ (a case on the Bills of Exchange Act 1882 s 75). The alternative view is that 'communication' is prima facie made when it is delivered to the offeree's address. See also the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 68.

8 It is not sufficient merely to communicate a revocation to an agent of the offeree who clearly has no authority to receive such revocation on behalf of the offeree: *Raeburn and Verel v Burness & Sons* (1895) 1 Com Cas 22 (the agent made it clear that he had no authority to receive the offer; and it is presumably on this basis that the court found that he had impliedly disclosed his lack of authority to receive the revocation of offer).

9 An offer made in writing may be revoked by word of mouth: *Re Natal Investment Co Ltd, Wilson's Case* (1869) 20 LT 962; *Re Universal Non-Tariff Fire Insurance Co, Ritso's Case* (1877) 4 ChD 774, CA; *Re Brewery Assets Corpn, Truman's Case* [1894] 3 Ch 272. As to revocation by post see generally para 676 et seq post; and as to international sales see para 684 post.

10 *Lovegrove v Campbell* (1949) 82 Ll L Rep 615; *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 (the council invited tenders by 27 August 1964 on a form which provided that the sale was subject to the approval of the Secretary of State, and that acceptance was to be sent by post to the address given in the tender. On 15 September 1964, the council's solicitor informed C Ltd's surveyor that 'the sale has now been approved' by the council, the surveyor having been previously told that the council would be recommended to accept C Ltd's tender. On 18 November 1964, the Secretary of State gave his approval, and C Ltd's solicitor was informed of this by a letter which added: '... We conclude that the contract is therefore binding on both parties. Kindly confirm'. On 5 January 1965, C Ltd's solicitor replied, 'we regret that we cannot confirm that there is a binding contract between the parties'. On 7 January 1965, council's solicitor sent a formal acceptance to the address given in the tender; held: (1) the tender was an offer; (2) the letter of 15 September 1964 was an informal acceptance communicated to C Ltd through its surveyor; alternatively, (3) the offer was formally accepted on 7 January 1965, it having been previously terminated neither by lapse of time (see para 646 post) nor by the letter of C Ltd's solicitor on 5 January 1965, nor by a revocation posted on 7 January 1965 (see para 676 post)); *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234 (equivocal letter no revocation).

11 See eg *Offord v Davies* (1862) 12 CBNS 748; *Byrne & Co v Van Tienhoven & Co* (1880) 5 CPD 344; *Henthorn v Fraser* [1892] 2 Ch 27, CA; *Raeburn and Verel v Burness & Sons* (1895) 1 Com Cas 22.

12 See eg *Payne v Cave* (1789) 3 Term Rep 148 (highest bidder said he would not take goods); *Gilkes v Leonino* (1858) 4 CBNS 485 (letter varying terms of offer); *Dickinson v Dodds* (1876) 2 ChD 463, CA (notice of act inconsistent with continuance of offer): see also *Stevenson, Jacques & Co v McLean* (1880) 5 QBD 346; *Cartwright v Hoogstoel* (1911) 105 LT 628.

13 As to offers to the world at large see para 639 ante.

14 *Shuey v United States* 23 L Ed 697, 92 US 73 (USA SC 1875).

15 Eg a person other than the offeror's agent: see the text and note 6 supra.

16 *Dickinson v Dodds* (1876) 2 ChD 463, CA; *Cartwright v Hoogstoel* (1911) 105 LT 628 (alternatively, the cases may be explicable by the doctrine of ratification in agency). But a mere rumour is insufficient to revoke: *McKenzie v Hiscock* (1965) 54 WWR 163, 55 DLR (2d) 155, Sask CA. Cf indirect communication of acceptance: see para 659 note 15 post.

17 Eg selling goods already offered elsewhere: see *Adams v Lindsell* (1818) 1 B & Ald 681; *Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346.

18 Eg an offer to sell goods 'whilst stocks last', or on a 'first-come-first served' basis.

19 Cf the time when notice is received of dishonour of a bill of exchange: *Eaglehill Ltd v J Needham Builders Ltd* [1973] AC 992 at 1011, [1972] 3 All ER 895 at 905, HL, per Lord Cross.

20 *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929 at 945-946, [1974] 3 All ER 88 at 96, CA, per Edmund Davies LJ (revocation reached the offeree's offices during the ordinary course of business but was left unattended). It is otherwise where the offeror sends his revocation at a time when he knows that none of the offeree's responsible staff are there to receive it; cf *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34 at 42, [1982] 1 All ER 293 at 296, HL, per Lord Wilberforce (acceptance by telex).

21 As to unilateral contracts generally see para 606 ante.

22 *Offord v Davies* (1862) 12 CBNS 748.

23 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA.

24 See para 657 text and note 17 post.

25 See para 657 text and notes 21-26 post.

26 Thus, the offeree or acceptor cannot compel performance by the offeror until he has completed performance of the requested act. As to performance as a condition precedent to the right to sue see generally para 961 post.

27 See para 657 note 25 post.

28 *Morrison Shipping Co Ltd v R* (1925) 20 Ll L Rep 283 at 287, HL, obiter per Viscount Cave LC.

## UPDATE

### 644 Revocation by offeror

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/645. Rejection by offeree.

#### **645. Rejection by offeree.**

The power to accept an offer<sup>1</sup> may be terminated by any unambiguous<sup>2</sup> intimation, express or implied, by the offeree to the offeror that he rejects the offer<sup>3</sup>. This will generally remain true notwithstanding that the offer was stated to be open for a certain period<sup>4</sup> as yet unexpired<sup>5</sup>. A rejection cannot be effective as such unless and until communicated to the offeror<sup>6</sup>; but, thereafter, the offer cannot be accepted unless subsequently revived by the offeror<sup>7</sup>, or unless the original offer was intended to continue notwithstanding a rejection<sup>8</sup>.

An offer can only be rejected by a definite indication of intention to reject<sup>9</sup>. Thus, there is no rejection where: (1) the offeree merely inquires whether the offeror would allow credit<sup>10</sup>; (2) the purported acceptance states that the acceptor will insist on strict observance of the contract<sup>11</sup>; (3) an auctioneer delays the fall of the hammer to ask for higher bids<sup>12</sup>; (4) the offeree opens a lower tender<sup>13</sup>; (5) an offeree 'accepts' an offer, but in the same communication offers to enter into a further contract<sup>14</sup>.

A counter-offer is often seen as having the effect of a rejection of the original offer<sup>15</sup>.

1 As to acceptance see para 650 post.

2 *Tinn v Hoffman & Co* (1873) 29 LT 271 at 278, Ex Ch, per Brett J (inquiry in plaintiff's letter of 27 November 1871 whether offeror would vary terms of offer was a rejection of the offer).

3 *Thornbury v Bevill* (1842) 1 Y & C Ch Cas 554; *Tinn v Hoffman & Co* (1873) 29 LT 271 at 278, Ex Ch, per Brett J. As to postal rejections see para 681 post.

4 Cf revocation by offeror: see para 644 ante. There are two exceptions: (1) where the time limit shows an intention that the offer is to continue notwithstanding rejection for the stipulated period (see note 7 infra); and (2) where the offeree is an option-holder (*Adams v Willis* 83 SE 2d 171, 225 S Ct 518 (USA 1954)). As to options see para 640 ante.

5 Expiry of a time limit will terminate an offer: see para 646 post.

6 Thus, a counter-offer will only operate as an offer when communicated: see para 642 ante. However, the mere evincing of an intention to reject by the offeree may be a condition terminating the offer: see further para 647 post. See also the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 68.

7 *Khaled v Athanas Bros (Aden) Ltd* [1968] EA 31, PC (expressly revived offer); *Livingstone v Evans* [1925] 3 WWR 453, [1925] 4 DLR 769 (Alta) (impliedly revived offer). See also *Dunlop v Higgins* (1848) 1 HL Cas 381.

8 The offer must show a clear intention that it is to continue notwithstanding the first rejection; cf para 663 head (b) post; the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 39; and see note 13 infra.

9 *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 (see para 644 note 10 ante; nothing in plaintiff's conduct in the period 15 September 1964 to 7 January 1965 suggested rejection of defendant's offer).

10 *Stevenson, Jacques & Co v McLean* (1880) 5 QBD 346.

11 *Brown & Gracie Ltd v FW Green & Co Pty Ltd* [1960] 1 Lloyd's Rep 289, HL.

12 See para 636 note 4 ante.

13     *Wheaton Building and Lumber Co v Boston* 204 Mass 218, 90 NE 598 (USA 1910) (each bid remains open for a reasonable time provided no contract is concluded with a competing bidder). As to tenders generally see para 635 ante.

14     *Tinn v Hoffmann & Co* (1873) 29 LT 271 at 273, Ex Ch, obiter per Archibald J.

15     *Hyde v Wrench* (1840) 3 Beav 334; *Tinn v Hoffmann & Co* (1873) 29 LT 271, Exch Ch; and see further para 663 post; but as to international sales see para 684 note 32 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/646. Lapse of time.

#### 646. Lapse of time.

The power to accept an offer<sup>1</sup> terminates at the time specified in the offer<sup>2</sup>; or, if no time is so specified, upon the expiration of a reasonable time<sup>3</sup>. What is a reasonable time is a question of fact, which may be judged, *inter alia*, in the light of the following factors: the purpose<sup>4</sup> or subject matter<sup>5</sup> of the offer; the conditions obtaining at the time of the offer<sup>6</sup>; the protracted nature of the negotiations<sup>7</sup>; the method by which the offer is communicated<sup>8</sup>; the subsequent conduct of the parties<sup>9</sup>, such as any express or implied renewals of the offer<sup>10</sup>; or the adequacy of the consideration in the case of an option<sup>11</sup>.

Where an offer stipulates for a reply by return of post, *prima facie*<sup>12</sup> it may be accepted by an answer posted on the day of receiving the offer<sup>13</sup>. Furthermore, *prima facie*<sup>14</sup> such a stipulation does not necessarily require that the reply be by post at all, it merely imposes a time limit within which the offeror should receive the acceptance<sup>15</sup>, however communicated<sup>16</sup>, as soon as if it had been sent by return of post<sup>17</sup>. It follows that this is also the case where there is no stipulation, but merely a request that the reply be by return of post<sup>18</sup>.

Finally, an offer may stipulate for a reply within a given period of time<sup>19</sup>. In such a case, *prima facie*<sup>20</sup> time begins to run from receipt of the offer by the offeree<sup>21</sup>. Alternatively, such an offer may clearly indicate that the acceptance must be received within the given period of time<sup>22</sup>.

1 As to the meaning of an offer see para 632 ante; as to the time when an offer is communicated see para 642 ante. If the specified time limit expires before the offer is communicated, logically there has never been any power of acceptance. But see *Adams v Lindsell* (1818) 1 B & Ald 681.

2 *Atlee v Bartholomew* 69 Wis 43, 33 NW 110 (USA 1887) ('must know by 2.30 pm today'; acceptance at 3.45 pm too late); *Real Estate Center Ltd v Ouellette* (1974) 47 DLR (3d) 568, New Brun SC (date specified and time made of the essence; and see generally para 932 post). If the express limitation is more vague, the exact time limit is a matter of interpretation: *Housing Authority of Lake Arthur v Miller & Sons* 239 La 966, 120 So 2d 494 (USA 1960) (offer good for 30 days held to remain open for whole of business day on thirtieth day). There is no power of late acceptance merely because an offeror prevents acceptance in time by absenting himself: *Brach v Matteson* 298 Ill 387, 131 NE 804 (USA 1921); contra where there is an option: *Unatin 7-Up Co v Solomon* 350 Pa 632, 39 A 2d 835 (USA 1944); and see para 640 ante.

3 See the cases cited in notes 4-11 *infra*. See also *Payne v Ives* (1823) 3 Dow & Ry KB 664; *Meynell v Surtees* (1855) 25 LJ Ch 257; *Powers v Fowler* (1855) 4 E & B 519n, Ex Ch.

4 *Loring v City of Boston* 7 Met 409 (USA Mass SC 1844) (reward offered for apprehension of arsonists).

5 *Ramsgate Victoria Hotel Co Ltd v Montefiore* (1866) LR 1 Exch 109 (application made in June to take shares; purported allotment in November too late); *Lovegrove v Campbell* (1949) 82 Ll L Rep 615 (offer to buy a yacht did not lapse within three weeks).

6 *Macrae v Edinburgh Street Tramways Co* 1885 13 R 265, Ct of Sess (offer of compromise terminated on subsequent award of arbitrator); *Bright v Low* 1940 SC 280. For further discussion of terminating conditions see para 647 post.

7 *Khaled v Athanas Bros (Aden) Ltd* [1968] EA 31, PC.

8 *Quenerduaine v Cole* (1883) 32 WR 185 (offer by telegram could not be accepted by letter); *Elison v Henshaw* 4 Wheat 225, 4 L Ed 556 (USA SC 1819) (reply by return of wagon; and see para 654 notes 6, 10 post). Where the parties are negotiating by a method of communication which is instantaneous, the ordinary inference is that an immediate reply is required: *Akers v Sedberry* 39 Tenn App 633, 286 SW 2d 617 (USA 1956) (offer made during a discussion of some hours at which both parties were present could not be accepted by a letter written three days later). But, in a mercantile transaction, an offer made by post may be accepted by a letter posted on the day on which the offer was received: *Dunlop v Higgins* (1848) 1 HL Cas 381.

9 *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593 at 1600, [1970] 1 WLR 241 at 248 per Buckley J (see para 644 note 10 ante); *Chemco Leasing SpA v Rediffusion Ltd* [1987] 1 FTLR 201, CA.

10 *Dunlop v Higgins* (1848) 1 HL Cas 381 (D's letter of 28 January 1845 renewed his offer of 22 January 1845); *Nelson Equipment Co v Harner* 191 Or 359, 230 P 2d 188 (USA 1951) (offer was subject to cancellation on a certain date, but offeror's conduct after that date showed that he regarded his offer as still operative); *Hammersberg v Nelson* 224 Wis 403, 272 NW 366 (USA 1937) (offer on 21 July 1934; in February 1935 offeror asked offeree when he might commence work, showing offer still open); *Crummer & Co v Nuveen* 147 F 2d 3, 157 ALR 739 (USA 7th Cir 1945) (similar case). Alternatively, an offeror might in such circumstances be regarded as waiving his time limit: see eg the Uniform Laws on International Sales Act 1967 s 2, Sch 2 art 9(1); and see generally paras 629 note 5 ante, 684.

11 *Re Longlands Farm, Long Common, Botley, Hants, Alford v Superior Developments Ltd* [1968] 3 All ER 552.

12 As to the position where the offer is misdirected see para 678 post.

13 *Dunlop v Higgins* (1848) 1 HL Cas 381 (stipulation met by a reply obviously made by return of post, though letter erroneously post-dated). Quaere, if the letter were post-dated, and not obviously sent by return of post; or if the offer were posted first-class, and the acceptance by second-class mail.

14 The offer may, however, exclusively stipulate for a reply by return of post, in which case acceptance can only be made in that manner. As to the rules relating to postal acceptances see para 676 et seq post.

15 As to acceptances see para 650 et seq post.

16 *Tinn v Hoffmann & Co* (1873) 29 LT 271 at 274-278, Ex Ch, obiter per Honyman and Brett JJ; but see at 274-277 per Archibald and Grove JJ. See also para 654 note 10 post.

17 There remains the difficulty that the ordinary acceptance dates from receipt (see para 659 post), whereas a posted acceptance prima facie dates from posting (see para 676 post).

18 *Johnson v King* (1824) 2 Bing 270; *Willis v Baggs and Salt* (1925) 41 TLR 453.

19 Eg reply by a specified date; or reply within eight days.

20 However, the offer might be phrased so that time runs from its transmission rather than its receipt.

21 *Caldwell v Cline* 109 W Va 553, 156 SE 55 (USA 1930) (offer simply said 'will give you eight days in which' to accept; time ran from receipt of offer, not from posting); *Barrick v Clark* [1951] SCR 177, [1950] 4 DLR 529, Can SC (time ran from receipt of letter at offeree's address, notwithstanding that he was away). As to the situation where the time limit expires before the offer is made see note 1 supra.

22 As to communication of acceptance see generally para 659 post. Similarly, it should be possible for the offeror to oust the postal rule and make acceptance operate from actual receipt by himself: see para 676 et seq post.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/647. Occurrence of terminating condition.

#### **647. Occurrence of terminating condition.**

Where an offer is made subject to a terminating condition, there is no power to accept the offer after the occurrence of that condition. The terminating condition may be express: for instance, that an offer remain open for a specified time<sup>1</sup>; or an offer of a reward to the first person to give certain information<sup>2</sup>. Alternatively, the condition may be implied, for instance: (1) an offer to buy or take goods on hire-purchase is conditional on their remaining in substantially the same state from then until acceptance<sup>3</sup>; (2) an offer to insure the life of a person cannot be accepted after that person has suffered serious injury<sup>4</sup>; (3) an offer to pay a certain rate of hire on the war-time requisition of a ship is determined by a material change in the diplomatic and military position<sup>5</sup>; (4) an offer of compromise is terminated on the subsequent award of an arbitrator<sup>6</sup> or court<sup>7</sup>, or the death of the offeree<sup>8</sup>; and (5) a bid made at auction may terminate when a higher bid is made<sup>9</sup>.

The effects of insanity, incapacity, insolvency and impossibility are considered later<sup>10</sup>.

1 See para 646 ante.

2 *Lancaster v Walsh* (1838) 4 M & W 16. But other offers to all the world may be designed so that the consideration may be supplied by any number of people: see eg *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA; and see generally para 639 ante.

3 *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA (offer to take goods on hire-purchase could not be accepted after the goods were damaged); and see further CONSUMER CREDIT.

4 *Canning v Farquhar* (1886) 16 QBD 727, CA (the proposed insured suffered serious injury by falling over a cliff; the case is also explicable on the grounds that there was an offer to enter a unilateral contract on payment of the premium, the offer being revoked before acceptance: see para 657 note 17 post); *Looker v Law Union and Rock Insurance Co Ltd* [1928] 1 KB 554: see INSURANCE vol 25 (2003 Reissue) para 533.

5 *Morrison Shipping Co Ltd v R* (1924) 20 Ll L Rep 283, HL; there is the alternative ground for the decision that the offeree did not perform the required act: see para 657 note 17 post. Viscount Finlay (at 288) expressly said that the decision was possible without invoking the doctrine of frustration. As to the doctrine of frustration see para 897 et seq post.

6 *Macrae v Edinburgh Street Tramways Co* (1885) 13 R 265 at 269, Ct of Sess, per Lord President Inglis; *Krupp Handel GmbH v Intermare Transport GmbH, The Elbe Ore* [1986] 1 Lloyd's Rep 176.

7 *Bright v Low* 1940 SC 280.

8 *Sommerville v National Coal Board* 1963 SC 666 (minute of tender in a personal injury case could not be accepted after death of offeree, because death extinguished a material element of claim, ie for loss of future earnings. As to the death of the offeror or offeree see para 648 post).

9 See para 636 ante.

10 See para 649 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/648. Death.

#### 648. Death.

The death of the offeror or offeree before acceptance<sup>1</sup> may render the offer incapable of acceptance thereafter<sup>2</sup>. Thus, where the proposed contract is to be one of 'personal' service<sup>3</sup>, so that death of a party after acceptance would lead to discharge of the contract by frustration<sup>4</sup>, the death of either party before acceptance will probably terminate the offer automatically<sup>5</sup>.

Whether the death of the offeror will, in respect of offers to enter into contracts other than those for personal service<sup>6</sup>, terminate the offer, depends in the first instance on whether or not that offer is irrevocable. Where an offer is irrevocable<sup>7</sup> it will be determined neither by the death of the offeror, nor by notice of that fact; for instance a lease with an option to purchase the reversion<sup>8</sup>, or renew the lease<sup>9</sup>; a provision in a partnership agreement for purchase by surviving partners of a deceased partner's share of the business<sup>10</sup>; an indivisible guarantee<sup>11</sup>. Where an offer is revocable<sup>12</sup> the effect of the offeror's death depends on the terms of the offer<sup>13</sup>. Thus, a divisible (continuing) guarantee<sup>14</sup> is, prima facie<sup>15</sup>, not determined by the mere fact of the death of the guarantor<sup>16</sup>; but there would appear to be no presumption either way as regards the effect of knowledge, as opposed to notice<sup>17</sup>, of that fact<sup>18</sup>.

The position would appear to be similar where, in respect of an offer to enter into a contract other than for personal service<sup>19</sup>, the offeree dies. Here too, if the offer is irrevocable<sup>20</sup>, it will not be determined by the death of the offeree<sup>21</sup>; and, where the offer is revocable<sup>22</sup>, the effect of the death of the offeree probably depends on the terms of the offer<sup>23</sup>.

The effect of death of a party subsequent to formation of a contract is considered later<sup>24</sup>.

1 As to acceptance see para 650 et seq post.

2 One possible view is that death will always render a revocable offer incapable of acceptance: *Blades v Free* (1829) 9 B & C 167 (agency by cohabitation terminated by death); *Thomson v James* (1855) 18 D 1 at 10, Ct of Sess, obiter per Lord President M'Neill; *Dickinson v Dodds* (1876) 2 ChD 463 at 475, CA, obiter per Mellish LJ. However, this view would appear to be based on the consensus theory, and that theory has now been modified: see para 631 ante.

3 'Personal' is here used to denote a type of contract similar to that type of contract which is terminated by the death of a party: see note 24 infra.

4 As to discharge by frustration see para 897 et seq post.

5 *Bradbury v Morgan* (1862) 1 H & C 249 at 255, obiter per Bramwell B; cf the res extincta cases: see para 894 post.

6 See note 3 supra.

7 *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA. As to offers rendered irrevocable by grant of a contract of option see para 640 ante. As to acceptance by performance see para 657 post.

8 *Lawes v Bennett* (1785) 1 Cox Eq Cas 167 (lease for seven years, option to be exercisable within part of that period); *Townley v Bedwell* (1808) 14 Ves 591 (lease for 33 years, option to be exercisable within first six years); *Re Adams and Kensington Vestry* (1884) 27 ChD 394, CA (lease for 60 years, option exercised in fifty-eighth year); *Griffith v Pelton* [1958] Ch 205, [1957] 3 All ER 75, CA (lease for 21 years, option expressed to be exercisable within one year of death of lessor). As to options to purchase see further LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 104.

9 *Nicholson v Smith* (1882) 22 ChD 640 (lease with option to renew every 21 years for ever). As to covenants for perpetual renewal see LANDLORD AND TENANT vol 27(1) (2006 Reissue) paras 540-542.

10 *Kelsey v Kelsey* (1922) 91 LJ Ch 382; cf the Partnership Act 1890 s 42(2): see further PARTNERSHIP vol 79 (2008) PARA 201 et seq.

11 *Lloyd's v Harper* (1880) 16 ChD 290, CA (father gave guarantee in return for Lloyd's admitting his son to membership, and under the byelaws members could not generally be excluded from membership). As to the distinction between indivisible and divisible guarantees see note 14 infra.

12 See note 14 infra. As to revocation see para 644 ante.

13 *Coulthart v Clementson* (1879) 5 QBD 42 at 46 per Bowen J: see also *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573 (divisible guarantee provided that it should only be determined by notice given by the guarantor or his personal representatives, thus showing that the offer was intended to survive the guarantor's death). Cf the Uniform Laws on International Sales Act 1967 s 2, Sch 2 art 11: see generally paras 629 note 5 ante, 684 post.

14 Where the offeree has provided the entire consideration requested by the offeror, the guarantee is said to be 'indivisible'; that is, the offer to enter into a single unilateral contract has been accepted by performance (see para 657 post), so that it cannot thereafter be revoked (see para 644 ante). But where the offer is to enter into a series of contracts, the guarantee is said to be 'divisible'; that is, each advance constitutes an acceptance and formation of a separate contract (see para 652 post), so that the guarantee may always be revoked as regards future advances (see para 644 ante). See *Lloyd's v Harper* (1880) 16 ChD 290, CA; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1203.

15 The better view appears to be as stated in the text; but see the view expressed in note 2 supra.

16 *Bradbury v Morgan* (1862) 1 H & C 249; *Ashby v Day* (1886) 54 LT 408, CA; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1203.

17 Notice by the offeror's personal representatives to the offeree will terminate a divisible guarantee: *Coulthart v Clementson* (1879) 5 QBD 42 at 47 obiter per Bowen J. Presumably, this is on the basis that the notice will amount to a revocation of the offer (as to revocation of offers see para 644 ante); cf the explanation by Bowen J in *Coulthart v Clementson* supra at 46 of *Harriss v Fawcett* (1873) 8 Ch App 866 (another explanation of the case is that the bank could not charge the guarantor's estate because it would be inequitable to do so).

18 Compare *Coulthart v Clementson* (1879) 5 QBD 42 (the bank to which the guarantee was given knew of the guarantor's death, and that his personal representatives had no power under his will to continue the guarantee) and *Re Whelen* [1897] 1 IR 575 (similar case where guarantor died intestate) with *Re Crace, Balfour v Crace* [1902] 1 Ch 733 (guarantee not determined by knowledge of death of guarantor). Cf revocation by reliable indirect information: see para 644 text to note 15 ante.

19 See note 3 supra.

20 See note 7 supra.

21 *Re Adams and Kensington Vestry* (1884) 27 ChD 394, CA (lease for 60 years with option for lessee or his personal representatives at any time within that period to purchase the reversion; option held validly exercised after lessee's death).

22 See notes 12, 14 supra.

23 Cf *Reynolds v Atherton* (1921) 125 LT 690 at 695, CA, obiter per Warrington LJ (affd (1922) 127 LT 189, HL); *Kennedy v Thomassen* [1929] 1 Ch 426 (case decided on grounds of: (1) communication of acceptance (see para 659 post); (2) death of offeree revoked her agent's power of acceptance (see AGENCY vol 1 (2008) PARA 188); and (3) impossibility (see paras 894, 902-903 post)); *Sommerville v National Coal Board* 1963 SC 666 (offer of compromise terminated by death of offeree); *Weatherby v Banham* (1832) 5 C & P 228 (after the death of the subscriber, the periodical continued to be sent to his address, and was received and read by B who had succeeded to his property. B was held personally liable to pay the subscription).

24 See para 903 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(ii) Offer and Invitation to Treat/649. Insanity, incapacity, insolvency and impossibility.

#### **649. Insanity, incapacity, insolvency and impossibility.**

The power to make an offer<sup>1</sup> may be stultified by, or the power to accept<sup>2</sup> an offer terminated by, the occurrence of any of the following events<sup>3</sup> either before the making of the offer<sup>4</sup> or before its acceptance<sup>5</sup>, as the case may be: (1) the insanity<sup>6</sup> or drunkenness<sup>7</sup> of a party; (2) sometimes intervening incapacity in the case of a corporation<sup>8</sup>; (3) the intended contract becoming illegal<sup>9</sup>; (4) the insolvency<sup>10</sup> of a party; or (5) impossibility of performance of the intended contract<sup>11</sup>.

1 As to the meaning of an offer see para 632 ante.

2 As to the meaning of an acceptance see para 650 post.

3 As to the determination of offers by terminating conditions see para 647 ante.

4 As to the time at which an offer is made see para 642 ante.

5 As to the time at which an acceptance operates see para 660 post.

6 There are two views as to the effect of the insanity of the offeror from the time the offer is made until its acceptance: (1) that an insane person cannot make an offer, so that there cannot be a contract: *Blackbeard v Lindigren* (1786) 1 Cox Eq Cas 205 (goods sold by auction knocked down to highest bidder who was later found to have been insane; as to issue whether next highest bidder would be the purchaser see para 636 note 4 ante); *Birkin v Wing* (1890) 63 LT 80 at 82-83 obiter per Kekewich J; *Manches v Trimborn* (1946) 174 LT 344 at 345 per Hallett J; and (2) that insanity does not (or perhaps, need not) prevent the formation of a contract, but may render it voidable at the instance of the insane party: *Molton v Camroux* (1849) 4 Exch 17, Ex Ch; *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, CA; *Baldwyn v Smith* [1900] 1 Ch 588; *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. See further MENTAL HEALTH vol 30(2) (Reissue) para 600 et seq. Cf drunkenness: see para 717 post.

7 As to the effect of drunkenness on the formation of a contract see para 717 post.

8 The offer may become ultra vires by reason of the nature or objects of the corporation, or the express or implied terms of its constitution: see further para 837 post.

9 The illegality may be in the formation or performance of the proposed contract: see further para 869 et seq post.

10 It would appear that the insolvency of the offeror does not of itself prevent subsequent acceptance of the offer: *Meynell v Surtees* (1854) 3 Sm & G 101 at 116, obiter per Stuart V-C. However, the offeror's liquidator or trustee in bankruptcy may always disclaim any onerous contract: see the Insolvency Act 1986 ss 178-182, 315-321 (as amended); and para 1072 post; and see further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 417. As to the effect of the insolvency of the offeree see para 651 post; and as to the effect of insolvency of a party after formation of the contract see paras 1067-1072 post.

11 As to initial impossibility see para 894 et seq post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/650. Meaning of 'acceptance'.

### (iii) Acceptance

#### 650. Meaning of 'acceptance'.

An acceptance<sup>1</sup> of an offer<sup>2</sup> is an indication, express or implied<sup>3</sup>, by the offeree<sup>4</sup> made<sup>5</sup> whilst the offer remains open<sup>6</sup> and in the manner requested in that offer<sup>7</sup> of the offeree's willingness to be bound<sup>8</sup> unconditionally<sup>9</sup> to a contract<sup>10</sup> with the offeror on the terms<sup>11</sup> stated<sup>12</sup> in the offer<sup>13</sup>.

The offer may request that the declaration by the offeree take the form of a promise or an act<sup>14</sup>: if the offer requests a promise, no contract is formed unless and until that promise is given<sup>15</sup>; and, if the offer requests an act, no contract is formed unless and until that act is performed<sup>16</sup>. Once the offer has been accepted, however, the offeror cannot revoke the offer<sup>17</sup>, and the offeree cannot withdraw the acceptance<sup>18</sup>.

Where there is a lengthy course of negotiations between the parties, it may be difficult to decide when they have reached agreement and have concluded a binding contract<sup>19</sup>. Despite the continuing negotiations, the court may be willing to find a concluded bargain<sup>20</sup>; and, if so, continuance of the negotiations thereafter will not itself terminate that agreement<sup>21</sup>, unless evincing a subsequent mutual intention to rescind that agreement<sup>22</sup>. Moreover, the court may be more willing to infer that the parties have reached a binding contract where one party to the continuing negotiations renders partial performance<sup>23</sup>, even to the extent of giving retrospective effect in respect of that partial performance<sup>24</sup>.

1 As to multiple acceptances see para 652 post.

2 As to the meaning of an offer see para 632 ante.

3 See paras 618 ante, 653-658 post.

4 As to who may accept an offer see para 651 post.

5 As to communication of acceptance see para 659 post.

6 As to the duration of an offer see paras 643-649 ante.

7 As to the mode of acceptance see paras 653-658 post.

8 Normally, the offeree must intend to be bound to the offeror: *Taylor v Allon* [1966] 1 QB 304, [1965] 1 All ER 557, DC (at the expiry of a motor insurance policy, the insurer sent a 15-day cover note; but the insured intended to change his insurance company and the court inferred from this that he did not intend to accept the offer contained in the cover note, and was therefore rightly convicted of driving whilst uninsured. Taking a vehicle out on the roads would normally in these circumstances be construed as an act of acceptance (see para 656 note 14 post). However, the insured expressly denied such an intention; and there could in the circumstances be no question of his being estopped from denying such an intention as he had made no representation to the insurer); *OTM Ltd v Hydranautics* [1981] 2 Lloyd's Rep 211 at 214 (a response to an offer which notified an 'intention to place an order' was not an acceptance).

As to estoppel see para 702 post; and see generally ESTOPPEL. As to intention to create legal relations see generally para 718 et seq post.

9 As to conditional acceptances see para 661 post.

10 *Moran v University College Salford (No 2)* [1994] ELR 187, CA. As to the meaning of 'contract' see para 601 et seq ante.

11 Where the negotiations include written stipulations, the meaning of those written stipulations is a matter of construction within the factual matrix: *Kennedy v Lee* (1817) 3 Mer 441; *Thoresen Car Ferries Ltd v Weymouth Portland Borough Council* [1977] 2 Lloyd's Rep 614; and see generally para 772 et seq post.

12 As varied by the doctrine of estoppel: see para 656 head (1) post. As to acceptances qualified by the introduction of further or different promises see paras 661-664 post. As to terms left open for further discussion see para 667 post.

13 As to acceptance in ignorance of the offer see para 665 post. As to the special postal rules of acceptance see paras 676-684 post. Where the offeror makes more than one offer, the offeree must state which offer he is accepting: *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234.

14 As to the distinction between bilateral and unilateral contracts see para 606 ante.

15 As to acceptance in respect of bilateral contracts see further paras 653-656 post.

16 As to acceptance in respect of unilateral contracts see further paras 653-657 post.

17 *Byrne & Co v Van Tienhoven & Co* (1880) 5 CPD 344; *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241. As to revocation of offers see para 644 ante.

18 As to revocation of acceptances see para 666 post.

19 See eg *Kennedy v Lee* (1817) 3 Mer 441; and paras 667-668 post.

20 See the cases cited in para 661 text and note 16 post.

21 *Perry v Suffields Ltd* [1916] 2 Ch 187; *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA.

22 See para 1013 et seq post.

23 See para 675 post. As to the 'battle of the forms' see para 664 post.

24 See para 631 note 10 ante. As to executed consideration see para 739 post.

## UPDATE

### 650 Meaning of 'acceptance'

NOTE 7--Formal emails do not constitute evidence of an agreement between parties, in particular where no acceptance of the offer is made: *Grant v Bragg* [2009] EWCA Civ 1228, [2010] All ER (D) 165 (Feb).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/651. Who may accept an offer.

### **651. Who may accept an offer.**

A revocable<sup>1</sup> offer can be accepted only by the person or persons<sup>2</sup> to whom it is made<sup>3</sup>, or by an agent on his or their behalf<sup>4</sup>; the power to accept an offer is not assignable<sup>5</sup>, though once the offeree has accepted the offer he may be able to assign the benefit of the contract<sup>6</sup>. On the other hand, an irrevocable<sup>7</sup> offer may be assignable<sup>8</sup>, in which case it may be accepted not only by the offeree but also by his assignee<sup>9</sup>.

Apart from the question of assignability, an offer can thus only be accepted by the offeree; and, in any particular case, it will be a question of interpretation as to whom the offer is made<sup>10</sup>. The offeror can restrict the power of acceptance to a single person<sup>11</sup>, or group of persons<sup>12</sup>, or he can extend it to the world at large<sup>13</sup>; and, if the offer is to a group of persons, the offeror may stipulate for acceptance by a designated number of them as a condition precedent<sup>14</sup> to his becoming contractually bound<sup>15</sup>.

There are three common situations where the above rules may cause difficulty by reason of events unknown to the offeror: (1) the offeree may sell his business to another<sup>16</sup>, and later that other may purport in good faith to accept an offer made to the offeree in the course of that business<sup>17</sup>; (2) it has been suggested that the bankruptcy of the offeror or offeree may prevent the formation of a contract<sup>18</sup>; and (3) a person may act fraudulently in purporting to accept an offer made to another<sup>19</sup>.

1 As to the revocation of offers see para 644 ante.

2 As to multiple acceptances see further para 652 post.

3 See also *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA (offer made to a limited company before its incorporation could not be accepted by its promoter; as to pre-incorporation contracts see further the Companies Act 1985 s 36C (as added)).

4 Generally, whatever a person has a power to do himself he may do by means of an agent acting within his authority (but not generally beyond that authority: see *Earl v Mawson* (1973) 228 Estates Gazette 529; affd (1974) 232 Estates Gazette 1315, CA)). However, the special rules in relation to undisclosed principal should be borne in mind: see generally AGENCY vol 1 (2008) PARA 125.

5 *Meynell v Surtees* (1854) 3 Sm & G 101 (an offeree of a way-leave for a railway attempted to assign the unaccepted offer); *Boulton v Jones* (1857) 2 H & N 564 (an unaccepted offer to buy goods from a manufacturer cannot be assigned together with that manufacturing business); *Ott v Home Savings and Loan Association* 265 F 2d 643 (USA 9th Cir 1958). Where, however, the offer is to enter into a unilateral contract and the performance by the offeree is not of a personal nature (as to which see para 648 note 3 ante), the offeree may come close to assigning his offer to X simply by delegating performance of the requested act to X and assigning his contractual rights against the offeror to X: *Boulton v Jones* (1857) 2 H & N 564 at 566, obiter per Pollock CB; *Petroleum Products Distributing Co v Alton Tank Line* 165 Iowa 398, 146 NW 52 (USA 1914).

6 As to when a contractual right is assignable see CHOSSES IN ACTION vol 13 (2009) PARAS 4, 6.

7 An offer may be irrevocable, inter alia, for the following reasons: (1) it is contained in a contract of option (see para 640 ante); (2) it amounts to a confirmed letter of credit (see generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq).

8 See note 6 supra.

9 See eg *Whiteley Ltd v Hilt* [1918] 2 KB 808, CA.

10 See eg *Weatherby v Banham* (1832) 5 C & P 228; *Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733; *Ott v Home Savings and Loan Association* 265 F 2d 643 (USA 9th Cir 1958).

11 See eg see the cases cited in note 3 supra.

12 Eg offers made to unincorporated associations: see paras 765-766 post.

13 As to offers to the world at large see para 639 ante.

14 Conditions precedent may be precedent to either (1) contract; or (2) performance: see further para 670 post.

15 See eg *Jasperson v Bohnert* 243 Iowa 1275, 55 NW 2d 177 (USA 1952) (offer to three joint owners of land not accepted by signatures of two only); *Hartman v Lauchli* 194 F 2d 787 (USA 8th Cir 1952) (similar case).

Another example is provided by takeover bids for companies, where the offer to buy shares may be conditional on acceptance by a certain proportion of the shareholders: see eg *Ridge Nominees Ltd v IRC* [1962] Ch 376, [1961] 3 All ER 1108, CA; and see COMPANIES vol 15 (2009) PARA 1511 et seq.

16 This problem does not arise where the offeree business is a registered company, and it is merely control of the company that is transferred, because a registered company is a separate legal entity: see generally COMPANIES.

17 *Meynell v Surtees* (1854) 3 Sm & G 101 (see note 5 supra); *Boulton v Jones* (1857) 2 H & N 564 (order intended for predecessor in business could not be accepted by successor without giving notice of that change). In such a case, the natural interpretation of an offer may well be that it was made to the person who was for the time being owner of the business. Thus, at first sight the decision might appear to run counter to the ordinary rule that the offer should be taken in its objective sense (see para 631 ante). However, in *Boulton v Jones* supra, Bramwell B expressly confined his remarks to the situation where the personality of the named offeree was important, in that case because the offeror had a set-off against him (at 566); and it appears from the argument of counsel in another report (6 WR 107 at 108) that the plaintiff knew of the set-off. See also *Upton-on-Severn RDC v Powell* [1942] 1 All ER 220, CA (cited in para 665 note 8 post).

18 See *Meynell v Surtees* (1854) 3 Sm & G 101 at 117 per Stuart V-C. The insolvency of the offeror before acceptance cannot prevent the formation of a contract: see para 649 ante. However, if the offeree is bankrupt, his estate will, on the making of the bankruptcy order, vest in his trustee: see Insolvency Act 1986 ss 278(a), 283(1); para 1068 post; and see further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 390 et seq. Offers to enter into contracts of personal service (see para 648 note 3 ante) with the bankrupt obviously cannot be accepted by his trustee; and in some circumstances, entry into a contract by an undischarged bankrupt may amount to a criminal offence (see generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY). In all other cases, it must be a matter of interpretation whether the offer is acceptable by the offeree personally or by his trustee: see the text to note 10 supra.

On the other hand, where the offeree goes into liquidation the position is as follows: during the winding up, any liquidator appointed will be an agent of the company (see para 1071 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 557), so that the problems considered in this section of the title do not thereby arise; but, after dissolution of the company any offer made to the company alone is necessarily totally incapable of acceptance.

As to the effect of insolvency of a party after formation of the contract see para 1067 et seq post.

19 See para 704 post.

## UPDATE

### 651 Who may accept an offer

NOTE 3--Companies Act 1985 s 36C replaced by Companies Act 2006 s 51: see COMPANIES vol 14 (2009) PARA 66.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/652. Multiple acceptances.

## **652. Multiple acceptances.**

A single offer may envisage multiple acceptances. It may empower a single offeree to accept many times, in which case the resulting series of contracts between the two parties may be bilateral<sup>1</sup> or unilateral<sup>2</sup>. Alternatively, a single offer may empower many offerees to accept, and the contracts resulting from the separate acceptances may be related<sup>3</sup> or entirely independent<sup>4</sup>.

1 See eg *Great Northern Ry Co v Witham* (1873) LR 9 CP 16 (undertaking to supply such quantities as the offeree may order from time to time). But compare *Jordan v Patterson* 35 A 521, 67 Conn 473 (USA 1896) (an offer in the form of 14 separate orders; held: on acceptance, to create a single contract for all the goods ordered) with *Banks v Crescent Lumber and Shingle Co* 61 Wash 2d 528, 379 P 2d 203 (Wash SC 1963) (67 separately numbered orders; held: each order was for a separate contract).

As to bilateral contracts generally see para 606 ante.

2 See eg *Offord v Davies* (1862) 12 CBNS 748 (offer to guarantee due payment if offeree would discount bills of exchange presented by X). Distinguish those situations where the act of acceptance creates a single contract: eg (1) indivisible guarantees (as to the distinction between divisible and indivisible guarantees see para 648 note 14 ante); and (2) a simple unilateral contract (see para 657 post).

As to unilateral contracts generally see para 606 ante.

3 Eg an offer made to an unincorporated association: see paras 765-766 post; cf the cases on competitions cited in paras 631 note 1 ante, 657 notes 3, 11 post. As to joint acceptances see para 662 post; and as to joint and several promises generally see para 1079 et seq post.

4 Eg the many contracts that might result from an offer as made in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA; or the contracts which may arise when an insured vehicle is repaired see *Charnock v Liverpool Corpn* [1968] 3 All ER 473, [1968] 1 WLR 1498, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/653. The modes of acceptance.

### **653. The modes of acceptance.**

It is usual to divide contracts into bilateral (or synallagmatic) and unilateral ones, according to whether the offeror in making his promise asks for acceptance by a return promise or by some other act<sup>1</sup>. The return promise in a bilateral contract may be express, or it may be implied from words or conduct<sup>2</sup>; and the act of acceptance in the case of a unilateral contract is performance of his side of the contract by the offeree<sup>3</sup>. It follows, therefore, that logically the real distinction between bilateral and unilateral contracts lies not in the nature of the act of acceptance, but in whether there is a contract before performance of that act; in a bilateral contract there will be an executory promise by the offeree, but in a unilateral contract the promise will be executed the moment it is made<sup>4</sup>.

Where the offer is to enter into a bilateral contract, it will become binding only when the offeree gives the requested return promise<sup>5</sup>. It follows that, as a general rule, mere silence on the part of the offeree will not constitute an acceptance<sup>6</sup>; but there may be additional circumstances which, taken together with the offeree's silence, may indicate a return promise<sup>7</sup>. Moreover, even where there is no prior return promise, it may be possible to accept the offer of a bilateral contract by commencement of performance<sup>8</sup>, as where the offeree makes a delivery or payment under a contract for the sale of goods<sup>9</sup>.

In the case of a unilateral contract, performance of his side of the contract constitutes acceptance by the offeree<sup>10</sup>. It follows that, if the offer requests performance as the sole mode of acceptance, it cannot be accepted by a return promise<sup>11</sup>; but such a purported acceptance will be a counter-offer<sup>12</sup>, and might itself be expressly or impliedly accepted by the original offeror<sup>13</sup>.

Thus far, consideration has been given only to the situation where the offeror stipulates for acceptance exclusively by return promise, or exclusively by performance. The offeree may, however, be given the choice of accepting either by return promise or by performance<sup>14</sup>.

1 See para 606 ante.

2 See para 654 post.

3 Whilst this is the normal case, there may be an act in return for a promise by the offeree. See further para 657 post.

4 For an alternative view of the distinction see para 654 note 3 post.

5 See para 654 post.

6 See para 655 post.

7 See para 656 post.

8 *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334, CA (insured accepted by conduct). Cf unilateral contracts, where completion of the act may be required before the offer is accepted: see para 657 post.

9 See eg *Harvey v Johnston* (1848) 6 CB 295 at 304 obiter per Cresswell J; *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666, HL (B had for some years supplied M with coal. B suggested a formal contract; M sent a draft to B; B inserted a further term, signed it, and posted it back to M. M never formally executed it, but both parties acted on it, coal being supplied and paid for in accordance with its terms; held: a contract had been concluded by the conduct of the parties); *Kessler v Pruitt* 14 Idaho 175, 93 P 965 (USA 1908) (B had option to enter into a bilateral contract for the purchase of goods; held: tender of the price was a sufficient acceptance.

As to options see para 640 ante; and as to tender of payment see paras 972-975 post); *Deering Milliken & Co Inc v Drexler* 216 F 2d 116 (USA 5th Cir 1954) (see para 634 note 12 ante).

10 See note 3 supra.

11 *Burton v Great Northern Rly Co* (1854) 9 Exch 507 (agreement by company to carry all goods tendered for carriage by B. The company having given notice of discontinuance of this arrangement, B's action for breach contract failed, on the basis that the offer was divisible). As to divisibility see para 648 note 14 ante. As to tenders generally see para 635 ante.

12 See para 663 post.

13 See para 654 post.

14 See para 658 post.

## **UPDATE**

### **653 The modes of acceptance**

TEXT AND NOTE 10--An offeree's performance of an act that would constitute performance of his side of the contract gives rise to a presumption that he accepts the offer but, as the meeting of minds is fundamental to any contract, the presumption is rebutted where the offeree performs the act without knowledge of the offer: *IRC v Fry* [2001] STC 1715.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/654. Acceptance by promise.

#### **654. Acceptance by promise.**

The essence of a bilateral contract is a stipulation in the offer for acceptance by means of a return promise<sup>1</sup>. Thus, a mere intention on the part of the offeree to accept is not enough; the offer can only be accepted by the making of a return promise<sup>2</sup>. Usually, but not necessarily<sup>3</sup>, the offer requires that the acceptance by way of a return promise be communicated to the offeror<sup>4</sup> before it will amount to a binding acceptance<sup>5</sup>. However, there are several possible types of stipulation as to the mode of acceptance.

First, the offer may stipulate, either expressly<sup>6</sup> or impliedly<sup>7</sup>, that the acceptance must be made in one particular manner. If so, then *prima facie* a binding acceptance can only be made in that stipulated manner; for instance by signature on the written contract 'on behalf of the owner'<sup>8</sup>, or by signing a formal acceptance note<sup>9</sup>. Usually<sup>10</sup>, an attempted acceptance in some manner other than the one stipulated will amount to a counter-offer<sup>11</sup>. Where, however, that mode of acceptance is prescribed by the offeree<sup>12</sup> solely for his own benefit, he will be able to waive that requirement<sup>13</sup>.

Secondly, the offer may not lay down only one prescribed mode of acceptance, although requiring a return promise<sup>14</sup>. There are two possibilities: (1) there may be no prescribed mode of acceptance, in which case the offer may be accepted in any unambiguous<sup>15</sup> and reasonable manner<sup>16</sup>; (2) the offer may merely suggest a (possibly preferred) mode of acceptance, in which case acceptance may be in the manner suggested<sup>17</sup>, or in any other unambiguous<sup>18</sup> and reasonable manner<sup>19</sup>. In either case, the acceptance may be express<sup>20</sup>. The acceptance may also be implied and, apart from the obvious case where the return promise may be logically implied from words used by the offeree, it may also be implied from his other acts<sup>21</sup> (even if those acts might constitute performance of a contractual promise<sup>22</sup>), or on the basis of reasonableness<sup>23</sup>, or by reference to another contract<sup>24</sup>; or it might even perhaps be implied from his silence<sup>25</sup>.

Finally, a communication described as an 'acceptance' will not necessarily amount to an acceptance in law, if it is clear that the parties do not so intend<sup>26</sup>.

1 See para 606 ante.

2 *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666 at 692, HL, per Lord Blackburn; *Powell v Lee* (1908) 99 LT 284.

3 See eg *Southern Water Authority v Carey* [1985] 2 All ER 1077; and see the cases cited in notes 8-9 infra. An alternative explanation is that the true distinction between bilateral and unilateral contracts lies in whether there can be a contract before the offeree communicates his intention to accept to the offeror; and on this basis, those cases should be classified as unilateral contracts.

4 As to communication of acceptance see para 659 post.

5 See eg the cases cited on revocation of offer before communication of acceptance in para 644 ante.

6 See eg *Eliaison v Henshaw* 4 Wheat 225, 4 L Ed 556 (USA SC 1819) (reply by return of wagon. As to another explanation of this decision see note 10 infra; and para 646 note 8 ante).

7 *Quenerduaine v Cole* (1882) 32 WR 185 (offer by telegram, reply by post. As to another explanation of this decision see note 10 infra; and para 646 ante); *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856, CA (insurance varied by signature on slip).

8 *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA (hire-purchase agreement); *Zarati Steamship Co Ltd v Frames Tours Ltd* [1955] 2 Lloyd's Rep 278 (charterparty); *Sociedade Portuguesa de Navios Tanques Lda v Hvalfangerselskapet Polaris AS* [1952] 1 Lloyd's Rep 407, CA (charterparty); *Orion Investments (Pvt) Ltd v Ujanaa Investments (Pvt) Ltd* [1988] LRC (Comm) 419, Zim. See also the cases on written signed contracts: see para 686 post.

9 *Compagnie de Commerce et Commission SARL v Parkinson Stove Co Ltd* [1953] 2 Lloyd's Rep 487, CA (sale of goods); *Varidex (London) Ltd v Doudney, Blair & Co Ltd* [1953] 2 Lloyd's Rep 521 (sale of goods).

10 It may be, however, that in specifying the mode of acceptance, the offeror obviously has some other object in view, such as the speed of the reply; and, if this be the case, the failure to reply in the specified manner will not be fatal so long as the offeror's obvious intention is satisfied. This may be the explanation of the decisions cited in notes 6-7 supra.

11 *Rees Hough v Redland Reinforced Plastics* (1984) 27 BLR 136, county court (as to the 'battle of the forms' see para 664 post). See also *Koplin v Bennett* 155 So 2d 568 (USA Fla App 1963). As to counter-offers see further para 663 post.

12 In such a case, the party soliciting the contract only makes an invitation to treat: see eg *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA. As to invitations to treat see para 633 ante.

13 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA (see further note 22 infra); *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241.

14 As to the case where it is not clear that a return promise is necessarily required see para 658 post.

15 *Loutfi v C Czarnikow Ltd* [1953] 2 Lloyd's Rep 213, CA. See also *Courtney Shoe Co v EW Curd & Son* 142 Ky 219, 134 SW 146 (USA 1911) where the words 'your order ... is at hand and will receive our prompt attention' were held not to be an acceptance.

16 See eg *Lovegrove v Campbell* (1949) 82 Ll L Rep 615. This proposition is a fortiori that in the text to note 19 infra. As to acceptance in the case of sales by auction see para 636 text and note 3 ante.

17 This follows from the cases cited in notes 8-9 supra.

18 See note 15 supra.

19 *British Guiana Credit Corp'n v Da Silva* [1965] 1 WLR 248, PC (ordinance provided that the corporation's assent to contract 'may be signified' in a certain way; held: that the ordinance was not mandatory, and did not preclude acceptance in some other manner); *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 (see paras 644 note 10 ante, 658 post); *Yates Building Co Ltd v RJ Pulleyn & Sons (York) Ltd* (1973) 228 Estates Gazette 1597 (option to purchase land (see para 640 ante) provided that it should be exercised by notice in writing sent by registered or recorded delivery; held: accepted by ordinary post). See also *Devencenzi v Donokonis* 170 Cal App 2d 513, 339 P 2d 232 (USA 1959) (P's written order said: 'If this is agreeable to you please sign the two copies. Keep one for your files and return the other copy to me as soon as possible'. D posted an acceptance without signing and returning a copy of the order; held: effective); *Re Crossman's Estate* 231 Cal App 3d 370, 41 Cal Rptr 800 (USA 1964) (option provided that all notices should be given in writing, either delivered personally or sent by registered mail; held: that this provision was not exclusive, so that option might be exercised by use of regular mail).

20 See eg *Lovegrove v Campbell* (1949) 82 Ll L Rep 615; *British Guiana Credit Corp'n v Da Silva* [1965] 1 WLR 248, PC. Cf *McDonald v John Twiname Ltd* [1953] 2 QB 304, [1953] 2 All ER 589, CA. As to the situation where the words 'I accept' do not constitute an acceptance in law see para 657 head (1) post.

21 See eg *Trinder & Partners v Haggis* [1951] WN 416, CA; the estate agency 'sole agency' cases (eg *Christopher & Co v Essig* [1948] WN 461); *Mott v Jackson* 172 Ala 448, 55 So 528 (USA 1911) (offer by carrier to transport staves if owner would place them on a certain wharf; offer accepted by piling the staves on the wharf); *Wood v Lucy, Lady Duff Gordon* 222 NY 88 (NY Ct of Apps 1917) (implied promise of best endeavours); *Autographic Register Co v Philip Hano Co* 198 F 2d 208 (USA 1st Cir 1952) (in respect of a licence of a disputed patent, the licensee sent the licensor a royalty cheque specifying that 'retention would constitute an undertaking to repay' in a certain event. The cashing of the cheque by the licensor was acceptance of an offer to modify the licence). Cf *Kirkham v Attenborough* [1897] 1 QB 201, CA; and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 120, 122.

22 Eg (1) renewal of contract: *St John Tug Boat Co Ltd v Irving Refining Ltd* [1964] SCR 614, 46 DLR (2d) 1, Can SC (continued use of services of tug after contract expired); *Acadia California Ltd v Herbert* 54 Cal 2d 328, 353 P 2d 294 (USA 1960) (P sent a cheque, expressly stating that its acceptance would constitute a renewal of

the contract to supply water); *Pyrate Corpn v Sorensen* 44 F 2d 323 (USA 9th Cir 1930) (licence with option to renew; licensee did not expressly renew, but with acquiescence of licensor granted sub-licences); and (2) performance of contract: *Roberts v Hayward* (1828) 3 C & P 432 (at expiry of lease, landlord offered to renew it at a higher rent. The tenant did not reply, but remained in possession, and was thereby bound to pay the higher rent); *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA (hiring agreement for telephone answering machine provided for bailor's acceptance by signature. Whilst the bailor did not sign the agreement, held: that his conduct in presenting requisite Post Office forms to the bailee for signature was an implied acceptance); *Canning v Farquhar* (1886) 16 QBD 727 at 731, CA, obiter per Lord Esher MR (a contract of insurance may be concluded where the insurer accepts the premium: see further INSURANCE vol 25 (2003 Reissue) para 131); *Rees Hough v Redland Reinforced Plastics* (1984) 27 BLR 136, county court. See also *High Wheel Auto Parts Co v Journal Co* 50 Ind App 396, 98 NE 442 (USA 1912) (P made offer to an exhibition organiser: 'Please reserve for us 234 square feet ...'; held: accepted by reservation of space before show opened); *Ostman v Lee* 91 Conn 731, 101 A 23 (USA 1917) (D took possession of a vehicle under an agreement to buy it if he found it useful for his business; held: two years' retention by D constituted an acceptance); *Sinclair Refining Co v May Bros Oil Co* 118 Ohio App 263, 194 NE 2d 75 (USA 1963) (counter-offer for part of goods offered included cheque; held: cashing cheque constituted acceptance of counter-offer).

The second line of cases may help to provide an answer to the question of how the mere commencement by the offeree of the act requested under a unilateral contract can bind the offeror: see further para 657 text and note 26 post.

23 See the Sale of Goods Act 1979 s 8(2); the Supply of Goods and Services Act 1982 s 15(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 56, 99.

24 Whether that other contract was between one of the parties and a third party (*Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, [1954] 2 All ER 158) or the same parties (*Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666 (draft written agreement never completed)).

25 See paras 655-656 post.

26 Eg the 'acceptance' of a tender (see para 635 ante); or of an offer which is to enter an exclusively unilateral contract (see para 657 post); or where the parties envisage contracting exclusively by entering a formal agreement (see para 667 post).

## UPDATE

### 654-661 Acceptance by promise ... Conditional acceptance

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/655. Acceptance by silence.

### 655. Acceptance by silence.

Where the offeree is silent following the offer of a bilateral contract<sup>1</sup>, a distinction must be drawn between the act of acceptance and communication of acceptance<sup>2</sup>. It is not always necessary that acceptance be communicated before it becomes effective<sup>3</sup>, but there must be an act of acceptance<sup>4</sup>.

The general rule is that if the only facts<sup>5</sup> are that there has been an offer followed by silence on the part of the offeree, there is no acceptance of that offer<sup>6</sup>, though there might be liability to pay a reasonable sum for any benefit received, either on the basis of an implied contract, or in restitution<sup>7</sup>. Thus, the offeror cannot bind the offeree against the latter's will by expressly stipulating that, if the offeree does nothing, he will be bound to a contract<sup>8</sup>, or to a variation<sup>9</sup> of an existing contract<sup>10</sup>.

On the other hand, it might be argued that, if the offeree makes up his mind to accept an offer containing such a stipulation and complies with the offer by remaining silent, the offeror should be bound. This is certainly true in the case of options of this type, though there the option-holder has agreed that his silence shall be acceptance<sup>11</sup>; and perhaps the same should be true in respect of other offers<sup>12</sup>, although even where there is objective evidence of the offeree's intention to accept, the courts have not usually accepted such a proposition<sup>13</sup>. A similar argument might be advanced where the mode of acceptance is specified by the offeree<sup>14</sup>, and he stipulates that his silence shall constitute acceptance<sup>15</sup>.

1 As to unilateral contracts see para 657 post.

2 As to communication of acceptance see para 659 post.

3 See eg *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA (but held: offer not then capable of acceptance); *Principal Investments Ltd v Trevett* [1956] OWN 353, 3 DLR (2d) 311 (Ont). Quaere whether a contract can amount to a bilateral one if it does not envisage communication of acceptance before commencement of performance: see para 654 note 3 ante.

4 See para 653 ante.

5 See *Kingsley and Keith Ltd v Glynn Bros (Chemicals) Ltd* [1953] 1 Lloyd's Rep 211 at 219 per Pilcher J. As to the situation where there are further facts see para 656 post.

6 *Re Empire Assurance Corp'n, Somerville's Case* (1871) 6 Ch App 266 (the C Company agreed to transfer its business to the E Company, one term being that each shareholder of the C Company should become a shareholder of the E Company. The former were accordingly registered as shareholders of the E Company; and to each was sent a letter: 'I have the pleasure to enclose your certificates for shares allotted to you in the (E Company), for which please sign and return me the accompanying form of receipt'. S, a shareholder of the C Company, ignored this letter; held: that he was not a shareholder of the E Company); *Challis's Case* (1871) 6 Ch App 266; *Curtis & William (Africa) Ltd v EG Mass (t/a EG Mass & Co)* [1957] 2 Lloyd's Rep 223 (after negotiating for the sale of goods, the parties met and S handed a written offer to B, who perused it quickly and took it away; held: no contract); *Capital Finance Co Ltd v Bray* [1964] 1 All ER 603, [1964] 1 WLR 323, CA (having wrongfully repossessed a car let under a hire-purchase agreement, the owner realised his mistake and left it outside the hirer's house; held: this was an offer of a novation, and there was no evidence that the hirer had accepted it); *Fairline Shipping Corp'n v Adamson* [1975] QB 180, [1974] 2 All ER 967 (alleged offer to vary contract by substitution of a party met by silence on the part of the offeree); *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796, [1985] 1 WLR 925, CA (no abandonment of arbitration by mutual inactivity: see further para 1014 post); *Re Selectmove Ltd* [1995] 2 All ER 531, [1995] 1 WLR 474, CA; *Manco Ltd v Atlantic Forest Products Ltd* (1972) 24 DLR (3d) 194, NB App Div (P delivered a tractor on free trial to D. D notified P that he would not buy it, but the tractor remained on his premises and D occasionally used it; held: D was only liable for the rental for actual use).

Cf the Unsolicited Goods and Services Act 1971 s 1: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 657 et seq. See also the cases in respect of silence on receipt of a counter-offer cited in para 656 note 6 post; and the cases on the acceptance of work voluntarily done cited in para 618 ante. See also *Troyer v Fox* 162 Wash 537, 298 P 733, 77 ALR 1132 (USA 1931) (T and A Company being joint owners of a patent, the A Company wished to sell its business to the C Company; and the C Company proposed to make the same offer to all the A Company's stockholders, including T. T informed F, an officer of the C Company, that he would only enter into such a contract if F would pay him for his half share of the patent. F did not reply, but T agreed to sell his shares to the C Company; held: F's failure to accept T's offer was not equivalent to assent).

7 See paras 618 ante, 1092 et seq post.

8 *Felthouse v Bindley* (1862) 11 CBNS 869 (affd on other grounds (1863) 1 New Rep 401) (P offered to buy a horse, adding 'If I hear no more about him I consider the horse mine ...'. The offeree did not reply, but did direct an auctioneer not to sell the horse with the rest of his stock as it was already sold. P's action against the auctioneer failed on the grounds that there was no contract under which P had agreed to buy the horse: see further note 13 infra). Cf *Conry v McLean* 117 Kan 595, 232 P 1030 (USA 1925) (a contract required a party at the conclusion of a test to announce whether he would take over a process; held: his silence did not constitute an agreement to buy).

9 *Fairline Shipping Corp v Adamson* [1975] QB 180, [1974] 2 All ER 967. As to variation of contracts see para 1019 et seq post.

10 *Markel v Stokes* 197 F 2d 933 (USA 5th Cir 1952) (brokerage commission agreement and subsequent disagreement as to its interpretation. M wrote to S, setting out his understanding of the agreement, but S never replied; held: the contract had been properly interpreted by S; M's letter was an offer of a novation; but S's silence and continued performance in the sense in which he understood the agreement was not an acceptance); *Hanson v Nelson* 82 Minn 220, 84 NW 742 (USA 1901) (offeree too sick to talk, and offeror of variation did not wish to trouble him; held: offeree's silence no acceptance). See further the many cases on attempts by one party to vary contracts for the sale or bailment of goods cited in the annotation to *Troyer v Fox* 77 ALR 1132 at 1142-1148 (USA 1931); and also *Deering Milliken & Co Inc v Drexler* 216 F 2d 116 (USA 5th Cir 1954). Cf the US *Uniform Commercial Code* s 2-207(2).

11 See *Favrot v Pertuit* 144 So 2d 477 (La App 1962) (a one year lease provided for its renewal at a higher rent for a further year if: (1) the lessor served a notice of increase; and (2) the lessee did not serve a notice of rejection, within 90 and 60 days of expiry of the first year respectively; held: lessee bound where renewal notice served but no rejection).

12 The principle cited might be supported by saying either that acceptance by silence can bind the offeror, or that there can be acceptance by mere conduct where the offeree has waived communication of acceptance. See also the American Law Institute's *Restatement of the Law of Contracts* (2d) (1981) s 69.

13 See *Felthouse v Bindley* (1862) 11 CBNS 869 (affd on other grounds (1863) 1 New Rep 401) (as to the facts see note 8 supra). However, the authority of this case is weakened by two factors: (1) it did not involve a dispute between offeror and offeree; and (2) the decision of the Court of Common Pleas rested at least in part on the grounds that there had not been compliance with the requirements of the Statute of Frauds (1677) (as to which see paras 624, 627 ante), and this was the sole ground on which the decision was affirmed by the Court of Exchequer Chamber. See also *Fairline Shipping Corp v Adamson* [1975] QB 180, [1974] 2 All ER 967.

14 See para 654 note 12 ante.

15 *Alexander Hamilton Institute v Jones* 234 Ill App 444 (USA 1924) (the institute operated a correspondence course, the terms being that they supplied 24 volumes on enrolment, and regular tuition thereafter; and that all applications be on a standard form, which made the applicant the offeror, and provided 'The retention of this application by the Institute denotes its acceptance'. J signed such a form; and in response the institute shipped to him the 24 volumes. Subsequently, J purported to revoke; held: J's offer divisible, and might be revoked as to any portion still unaccepted. The authority of this case is weakened by the following facts: (1) it is difficult to find evidence of an intention that the contract be divisible (as to which see generally para 648 note 14 ante); and (2) delivery of the 24 volumes appears to be an implied acceptance (see para 654 ante).

## UPDATE

### 654-661 Acceptance by promise ... Conditional acceptance

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.





Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/656. Acceptance by silence plus additional circumstances.

**656. Acceptance by silence plus additional circumstances.**

Whilst the general rule is that an offer is not accepted by mere silence on the part of the offeree<sup>1</sup>, there may be further facts which, taken together with the offeree's silence, constitute an acceptance<sup>2</sup>. For example:

- 17 (1) there may be other conduct on the offeree's part which raises an estoppel<sup>3</sup>; but no estoppel arises where one party to a contract requests the other to vary its terms<sup>4</sup>, and that other merely continues to perform the terms of that contract<sup>5</sup>;
- 18 (2) mere silence on the part of the original offeror on receipt of a counter-offer will not usually operate as an acceptance<sup>6</sup>; but it might do so in the case of a 'late acceptance' of an offer without definite time limit<sup>7</sup>, or where the original offeror only objects to some of the additional terms contained in the counter-offer<sup>8</sup>;
- 19 (3) where the offer is ambiguous, and the offeree communicates with the offeror showing that he understood the offer in a particular sense, this communication will probably amount to a counter-offer<sup>9</sup>; in which case, it may be that mere silence by the original offeror will constitute his acceptance<sup>10</sup>;
- 20 (4) where, in pursuance of a request by another, goods or services are supplied to him under such circumstances that the supply is an offer<sup>11</sup>, their receipt without notice of refusal by the offeree may amount to an acceptance<sup>12</sup>; but the effect of the converse situation where a salesman solicits an order, that order being the offer, and the offeree does not reply within a reasonable time is more doubtful<sup>13</sup>;
- 21 (5) where an offer to renew an insurance policy is sent to the insured on or about its expiry date, the course of dealings between the parties may justify the inference that the insurer's offer has been accepted, notwithstanding that the offeree remains silent<sup>14</sup>; but an unanswered application for an insurance policy, that application being an offer, probably will not lead to an inference of acceptance<sup>15</sup>;
- 22 (6) where a periodical continues to be posted to a subscriber after expiry of his subscription, the receipt and reading of the periodical may be an acceptance<sup>16</sup>.

1 See para 655 ante.

2 Eg by conduct: see *André et Cie SA v Marine Transocean Ltd, The Splendid Sun* [1981] QB 694, [1981] 2 All ER 993, CA; *Wettern Electric Ltd v Welsh Development Agency* [1983] QB 796, [1983] 2 All ER 629; and see para 654 ante. As to implied contracts see generally para 618 ante. In some of the cases cited in this paragraph, an alternative explanation may be that the parties have really made a unilateral contract, as to which see para 657 post.

3 See eg *Roberts v Hayward* (1828) 3 C & P 432; *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA (D allowed his wife, without his authority, to enter into a contract to sell his house to P; and thereafter D allowed P to expend money on repairs to the house; held: D estopped from denying his wife's authority to sell); *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334, CA (acceptance of counter-offer by seven months' silence); *Wood and Brooks Co v Hewitt Lumber Co* 89 W Va 254, 109 SE 242 (USA 1921) (P sent a written order for a quantity of timber, adding: 'If you cannot deliver as ordered, please advise us immediately'. D did not reply; but some eight months later delivered a lesser quantity; held: the delivery was an implied acceptance of the offer); *Ashland Oil and Refining Co v Beal* 224 F 2d 731 (USA 5th Cir 1955); certificate denied 76 S Ct 436 (A Company and B, being joint owners of an oil and gas lease, were negotiating as to who should pay drilling and operating costs. A Company promised to reduce the terms negotiated to writing, but did not do so. B wrote to A Company setting out his understanding of the terms, adding: 'If the above is not strictly in accordance with [your] understanding, please advise'. A Company made no reply for ten months, whilst operations continued; held: A Company estopped by its silence from denying acceptance).

As to estoppel see further generally *Pickard v Sears* (1837) 6 Ad & El 469 (P, being the legal owner of goods in the possession of M, stood by in silence whilst the sheriff took and sold those goods as part of an execution levied on M. P's action in trover failed on the grounds that his conduct gave a sort of sanction to the proceedings); *Greenwood v Martins Bank Ltd* [1933] AC 51, HL; and ESTOPPEL vol 16(2) (Reissue) para 957. See also *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, CA (apparent authority of bank's senior manager to approve financing facilities); and as to the doctrine of ratification of an agent's act by acquiescence see AGENCY vol 1 (2008) PARA 68.

4 As to variation of contracts see para 1019 et seq post.

5 *Maryland Casualty Co v United States* 169 F 2d 102 (USA 8th Cir 1948) (unambiguous and complete sub-contract for work on an army air base. One party sent to the other written proposals for alterations to its terms; but the other did not reply; held: the latter's performance of the sub-contract did not estop him from denying acceptance of the proposed alterations); *Fairline Shipping Corp v Adamson* [1975] QB 180, [1974] 2 All ER 967 (alleged offer to vary a contract by substitution of a party met by silence on the part of offeree). See further the cases cited in para 655 note 10 ante.

6 See eg *Columbia Malting Co v Clausen-Flanagan Corp* 3 F 2d 547 (USA 2nd Cir 1924) (on receipt of the counter-offer, P replied that 'no doubt' D meant the same as P did in his original offer; but the court held they were not ad idem); *Todorovich v Kinnickinnic Mutual Loan and Building Association* 238 Wis 39, 298 NW 226 (USA 1941) (P did not reply to D's counter-offer; held: P's alleged performance without any notice of such to D did not amount to an acceptance). A fortiori, where the response does not amount to a counter-offer: *Saltzberg and Rubin v Hollis Securities Ltd* (1964) 48 DLR (2d) 344 (NS). A counter-offer will operate as a new offer (see para 663 post); and acceptance of that new offer is therefore prima facie governed by the same rule as that for acceptance of the original offer (see para 655 ante); but see *Steven v Bromley & Son* [1919] 2 KB 722 at 728, CA, obiter per Atkin LJ.

7 *Morrell v Studd and Millington* [1913] 2 Ch 648 at 657-658 per Astbury J; *Compania de Navegacion Pohing SA v Sea Tanker Shipping (PTE) Ltd, The Buena Trader* [1978] 2 Lloyd's Rep 325, CA (late acceptance by telex of counter-offer was itself a counter-offer, accepted by conduct of parties). But compare the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 70. The argument for this view is that the 'late acceptance' may, unknown to the offeree, be a counter-offer; that he might reasonably proceed on the basis that there is a contract; and that the original offeror ought to be under a duty to warn him of his mistake. Sed quaere.

8 *Construction Aggregates Corp v Hewitt-Robbins Inc* 404 F 2d 505 (USA 7th Cir 1968); certificate denied 89 S Ct 1774 (in reply to P's offer, D sent a counter-offer proposing several alterations, including the terms of payment. P agreed to the requested change as to terms of payment; held: P had impliedly accepted the other alterations).

9 See para 708 note 9 post.

10 *Allen v Wolf River Lumber Co* 169 Wis 253, 172 NW 158 (USA 1919) (in reply to offer to sell '500 or 1,000 cords of bark', the buyer made it clear that he understood the amount to be 1,000 cords. Negotiations continued on other points without further mention of quantity; contract for sale of 1,000 cords). It may be possible to explain this rule on the basis that the original offeror is estopped from denying a contract in the sense understood by the offeree: *Ireland v Livingston* (1872) LR 5 HL 395 at 416 per Lord Chelmsford; and see *Church v Bobbs-Merrill Co Inc* 272 F 2d 212 (USA 7th Cir 1959); and *Brown & Gracie Ltd v FW Green & Co Pty Ltd* [1960] 1 Lloyd's Rep 289 at 303, HL, per Lord Denning.

11 In the usual case, the supply of goods or services would be an acceptance: see para 653 note 9 ante. But this might not be the case, where the request is a mere invitation to treat (see para 633 ante); or where the supply is a counter-offer (see para 654 text and note 11 ante); or where there is a standing arrangement: *Hobbs v Massasoit Whip Co* 158 Mass 194, 33 NE 495 (USA 1893) (see further para 657 note 15 post).

12 See eg (1) requests for delivery on free trial: see the Sale of Goods Act 1979 s 18 r 4; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 120; (2) where delivery of goods is a counter-offer: *Lubell v Rome* 243 Mass 13, 136 NE 607 (USA 1922) (retention of goods delivered and complaint as to quality); *National Benefit Trust Ltd v Coulter* 1911 SC 544; (3) notice of increased charges for services followed by use of those services: *Caledonian Rly Co v Stein & Co Ltd* 1919 SC 324. See also *Jordan v Norton* (1838) 4 M & W 155 obiter (retention of the horse beyond a reasonable time would have amounted to an acceptance); *St John Tugboat Co Ltd v Irving Refining Ltd* [1964] SCR 614, 46 DLR (2d) 1, Can SC (continued use of services of tug after expiry of contract); (4) course of dealings: *Alexander Hamilton Institute v Jones* 234 Ill App 444 (USA 1924) (see para 655 note 15 ante); (5) estate agents' instructions: *Way & Waller Ltd v Ryde* [1944] 1 All ER 9, CA (owners of hotel, D, instructed P to find a purchaser. P sent his scale of charges, but D did not reply. P found a purchaser; held: P entitled to his scale charges); *John E Trinder & Partners v Haggis* [1951] WN 416, CA (strong dissent by Denning LJ).

13 Compare the cases cited on this point in the annotation to *Troyer v Fox* 77 ALR 1132 at 1142-1153 (USA 1931); and see also the case cited in para 655 note 15 ante.

14 The cover note is probably an offer: see para 634 head (6) ante. Acting on the cover note, as by taking a vehicle out on the road, may be an acceptance: *Taylor v Allon* [1966] 1 QB 304 at 311, [1965] 1 All ER 557 at 559, DC, obiter per Lord Parker CJ; and see *National Union Fire Insurance Co v Ehrlich* 122 Misc 682, 203 NYS 434 (USA 1924). However, it may be that there is no acceptance where the 'insured' simply remains silent: see para 655 ante; and perhaps, a fortiori, if there is no course of dealings, or the cover note proposes a material change in the terms.

15 The normal standard form proposal will provide that the form signed by the proposer is the offer; for formation of contracts of insurance see INSURANCE; and see also para 634 note 22 ante. In cases in the United States of America, it still seems to be regarded as the general rule that mere delay in replying to a proposal is no acceptance; but the courts seem prepared to look for 'exceptions': see eg *Lechler v Montana Life Insurance Co* 48 ND 644, 186 NW 271 (USA 1921); *Bellak v United Home Life Insurance Co* 244 F 2d 623 (USA 6th Cir 1957); *Combined American Insurance Co v Parker* 377 SW 2d 213 (Tex Civ App 1964).

16 *Weatherby v Banham* (1832) 5 C & P 228, where the offeree was merely the successor in title to the subscriber, but was held personally liable on the basis that he had made a contract with the publisher. Quaere whether on the facts stated in the text, or in this case, the periodical would be 'unsolicited goods' within the Unsolicited Goods and Services Act 1971 ss 1, 6(1): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 658.

## UPDATE

### 654-661 Acceptance by promise ... Conditional acceptance

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/657. Acceptance by act.

### **657. Acceptance by act.**

The essence of a unilateral contract is a promise by the one party in return for an act by the other<sup>1</sup>. Usually, the offeror makes a promise, stipulating for acceptance by means of performance by the offeree of the consideration requested in exchange for the offeror's promise: for example the offer of a reward in exchange for a certain act, such as the giving of information<sup>2</sup>, the winning of a race or other contest<sup>3</sup>, the use of a medicine or the purchase of a particular product<sup>4</sup>, or the entry into another contract<sup>5</sup>; the offer to carry a passenger in return for his buying a ticket<sup>6</sup>; the offer to pay the price if the seller delivers goods<sup>7</sup>; the offer to pay for requested services accepted by rendering the services<sup>8</sup>; the offer of a guarantee in exchange for forbearance to sue a third party<sup>9</sup>, or the extending of credit to him<sup>10</sup>; the offer by a race entrant to compensate all other entrants who suffer loss by his breach of the rules<sup>11</sup>; the offer of a consignor of goods by way of bill of lading of immunity to any independent contractor who helps in the transportation process<sup>12</sup>; or the offer by way of tender to supply such stores as may be ordered<sup>13</sup>. Alternatively, the offeror may perform an act in exchange for a promise: for example the offeree who accepts the benefit of services rendered and promises to pay for them<sup>14</sup>; or where there is an offer to sell goods made by their delivery under a stipulation excluding any promise on the part of the seller<sup>15</sup>.

Whereas in a bilateral contract there is an exchange of promises, in a unilateral contract there is a promise on one side only. If the offeror requests acceptance exclusively by performance, this has the following logical results: (1) any purported acceptance by return promise cannot be an effective acceptance<sup>16</sup>; (2) acceptance can only be made by performance of the requested act, so that the offer can be revoked at any time before that performance is completed<sup>17</sup>; (3) there is no need to give advance notice of acceptance, which may raise the question of knowledge of the offer at the time of performance<sup>18</sup>.

Where the offeror purports to revoke before completion of the requested act, the first two of these results may sometimes lead to an injustice, though there may be ways of avoiding it. Thus, where there is a purported acceptance by return promise, it may operate as a counter-offer and be expressly or impliedly accepted by the original offeror<sup>19</sup>; or it may be possible to interpret the original offer as asking in the alternative for a return promise or acceptance by performance<sup>20</sup>. As regards the second result, it may be possible to find a binding contract once the offeree has made an unequivocal<sup>21</sup> start on performance<sup>22</sup> of the requested consideration on one of the following grounds: (a) the offer stipulated in the alternative for a return promise or acceptance by performance<sup>23</sup>; (b) there is an implied collateral contract<sup>24</sup> that the offeror will keep his offer open once the offeree has commenced performance<sup>25</sup>; or (c) it has even been argued that the offer to enter into a unilateral contract is accepted on commencement of performance, even though completion of performance is a condition precedent to the offeror's liability to perform his promise<sup>26</sup>.

1 See para 606 ante. A deed poll is effective simply on delivery: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 3; and as to the acknowledgement of a statute-barred debt see LIMITATION PERIODS.

2 See eg the cases where a reward is offered for information leading to the discovery, apprehension or conviction of the perpetrator of a crime or the recovery of stolen property: *Williams v Carwardine* (1833) 4 B & Ad 621; *England v Davidson* (1840) 11 Ad & El 856; *Tarner v Walker* (1867) LR 2 QB 301, Ex Ch; *Bent v Wakefield Bank* (1878) 4 CPD 1; *Thatcher v England* (1846) 3 CB 254; *Smith v Moore* (1845) 1 CB 438. In the particular case, everything may depend on the precise wording of the offer, eg whether it stipulates that the offeree's information must be the exclusive cause of the stipulated result, or whether there is to be pro rata payment where that result is partially achieved: see the cases cited in para 639 notes 4-5 ante. In any event,

the offer may be incapable of acceptance by one under a public duty to obtain the information: see para 745 post.

As to performance in ignorance of the offer see para 665 note 4 post.

3 *Earl Ellesmere v Wallace* [1929] 2 Ch 1, CA; *Moreno v Marbil Productions Inc* 296 F 2d 543 at 544 (USA 2nd Cir 1961), obiter. Cf the cases where a contestant has been awarded damages for wrongfully preventing his competing: *Chaplin v Hicks* [1911] 2 KB 786, CA; *Hawrysh v St John's Sportsmen's Club* (1964) 49 WWR 243, 46 DLR (2d) 45 (Man). See further note 11 infra.

4 See para 639 note 6 ante.

5 *Esso v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, HL (to buy petrol); *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, [1978] 2 All ER 557, CA (to enter a written contract); *Chandler v Kerley* [1978] 2 All ER 942, [1978] 1 WLR 693, CA (contractual licence to occupy house). As to collateral contracts see generally para 753 post; and as to tenders see para 658 post.

6 *Denton v Great Northern Rly Co* (1856) 5 E & B 860. For further consideration of ticket contracts see para 638 ante.

7 *Fragano v Long* (1825) 4 B & C 219; *Wood v Benson* (1831) 2 Cr & J 94; *Hollidge v Gussow Kahn & Co Inc* 67 F 2d 459 (USA 1st Cir 1933). In this type of case, however, the offer is frequently interpreted as being acceptable either by return promise or by delivery: see paras 653 note 9 ante, 658 note 4 post.

8 In some circumstances, such a contract will be one of employment: *R v Lyth Inhabitants* (1793) 5 Term Rep 327; and see further EMPLOYMENT vol 39 (2009) PARA 15. There are, however, a large number of other types of service where performance of the requested service will constitute acceptance; eg various types of agency, as to which see AGENCY vol 1 (2008) PARA 11 et seq; contracts to maintain goods; postal tuition courses. Cf a promise to pay a pension if an employee resigns.

9 *Oldershaw v King* (1857) 2 H & N 517, Ex Ch; *Wilby v Elgee* (1875) LR 10 CP 497. As to forbearance as consideration see para 741 post.

10 *Bradbury v Morgan* (1862) 1 H & C 249 (for the effect of death on such a guarantee see para 648 ante); *Offord v Davies* (1862) 12 CBNS 748; *Re Agra and Masterman's Bank, ex p Asiatic Banking Corp'n* (1867) 2 Ch App 391. Cf *Lloyd's v Harper* (1880) 16 ChD 290, CA (guarantee in return for admission of son to Lloyd's).

11 *The Satanita* [1897] AC 59, HL; *Meggesson v Burns* [1972] 1 Lloyd's Rep 223, Mayor's and City of London Ct. Cf the cases cited in note 3 supra, which concern the contract made between the organiser of the competition and each competitor. Under neither contract will the competitor usually bind himself to complete the competition; but it may be that the contracts between competitors are bilateral.

12 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC: see also CARRIAGE AND CARRIERS vol 7 (2008) PARA 85.

13 *Great Northern Rly Co v Witham* (1873) LR 9 CP 16 (tender 'accepted' but subsequent order refused; it was held that a unilateral contract had been made when first order placed). The tender amounted to an offer and it has been said that this case is a classic example of a unilateral contract: see *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 181, [1974] 1 All ER 1015 at 1032, PC, obiter per Lord Simon. But that analysis contains some difficulties. The order (the alleged acceptance and consideration) had no economic value apart from the promise it contained, and it would seem more realistic to regard the tender as an offer to enter into a bilateral contract, the order (acceptance) being a return promise to buy a certain quantity of goods (as to acceptance by promise see para 654 ante); or perhaps the tender might allow for two alternative modes of acceptance, ie (1) a return promise (the order); or (2) an act (payment). As to alternative modes of acceptance see para 658 post.

14 See eg *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334, CA (counter-offer and silence; as to the latter see para 656 note 3 ante); *Miller v International Harvester Co of America* 179 Kan 711, 298 P 2d 279 (USA 1956) (at D's invitation, P disclosed an idea to D, and in return D promised to pay for it if use should be made of it. Held: D bound to pay a reasonable sum). The promise to pay may be express or implied, and give rise to liability in contract or restitution: see further RESTITUTION. As to the problem of past consideration raised by this situation see para 739 post. Cf the doctrine of ratification in agency: see AGENCY vol 1 (2008) PARA 57 et seq.

15 See eg *Weatherby v Banham* (1832) 5 C & P 228; *Hobbs v Massasoit Whip Co* 158 Mass 194, 33 NE 495 (USA 1893) (on four or five previous occasions, P sent skins to D which D accepted and paid for; D's receipt and retention of goods in silence beyond a reasonable time might amount to an acceptance); *JW Carter Co Inc v Farley Clothing Co* 216 Miss 238, 62 So 2d 305 (USA 1953) (manufacturer, P, sent 35 pairs of shoes to retailer, D, without them being ordered. D retained four pairs and returned the rest to P. Held: retention of four pairs

constituted acceptance of whole shipment). In the usual case, there will (in the absence of any effective exclusion) be some express or implied promises on the part of the seller, so that the contract will be bilateral: see para 654 ante.

As to statutory limitations on such exclusions see paras 793-794, 826 post. See also the Unsolicited Goods and Services Act 1971; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 657 et seq.

16 See para 653 ante.

17 See eg *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL (L Ltd offered to pay a commission (said to be on completion of sale) to C if C introduced a purchaser for property owned by L Ltd. C introduced a prospective purchaser, but L Ltd, for its own benefit, did not proceed with the sale. C not entitled to any commission); cf *Christie Owen and Davies Ltd v Rapacioli* [1974] QB 781, [1974] 2 All ER 311, CA (the details were similar except that commission became payable if a buyer was produced who was ready, willing and able to purchase; the vendor, for his own reasons, refused to complete the sale but he was held liable to pay the commission); *Morrison Shipping Co Ltd v R* (1924) 20 Ll L Rep 283, HL (for an alternative explanation see note 26 infra); *Canning v Farquhar* (1886) 16 QBD 727, CA (for an alternative explanation of this case see para 647 note 4 ante); *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 181, [1974] 1 All ER 1015 at 1031, PC, obiter per Lord Simon of Glaisdale; *Petterson v Pattberg* 248 NY 86, 161 NE 428 (NY CA 1928) (a lender offered to accept less than the full debt if it were paid off before the debt were due. The debtor offered to tender the sum requested, but the creditor had already sold the debt. Held: the creditor had revoked his offer before acceptance, which could only be by actual tender). In the cases where a commission is offered for the rendering of services, it may be that the contract is bilateral (as to which see paras 606, 654 ante), because the agent has made some promise in return, such as to advertise property for sale: see further AGENCY. There are two alternative explanations of *Luxor (Eastbourne) Ltd v Cooper* supra: (1) the agent had merely prepared to perform the requested act (see further note 21 infra); or (2) the offer stipulated for one entire act on the part of the offeree (see further note 26 infra). As to entire obligations see para 922 post.

Distinguish the 'sole agency' cases, which have been treated as bilateral contracts on the grounds that the agent promised, eg to use his best endeavours: see para 654 note 21 ante.

18 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 269-70, CA, per Bowen LJ. As to acceptance in ignorance of the offer see para 665 post.

19 See para 653 ante.

20 See para 658 post. To avoid the present problem the courts frequently strain to read an offer in such a way that it is capable of giving rise to a bilateral contract: *Dawson v Helicopter Exploration Co Ltd* [1955] SCR 868 at 875, [1955] 5 DLR 404 at 411, Can SC, per Rand J.

21 Acts which are merely preparatory to performance of the requested act are not sufficient: *Offord v Davies* (1862) 12 CBNS 748 at 753 per Erle CJ. It is possible to interpret the statement by Erle CJ as an affirmation of the proposition stated in the text to note 17 supra; but it is also possible to explain *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL, on the basis of the proposition stated in this note.

22 The duty to mitigate may require a cessation of performance on notice of revocation. As to the duty to mitigate see further DAMAGES. Distinguish bankers' irrevocable credits, where the banker's obligation to the seller does not depend on any part performance by the seller.

23 Another explanation of *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA, is that the offer requested alternative modes of acceptance (see para 658 post), and that the unequivocal commencement of performance was an implied acceptance of a bilateral contract: see para 654 note 21 ante. See also note 20 supra.

24 As to collateral contracts generally see para 753 post.

25 *Abbott v Lance* (1860) Legge 1283, NSW FC. See also the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 45. As to contracts of option generally see para 640 ante.

26 *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA (a father bought a house for his son and daughter-in-law on mortgage, taking the house in his own name, and paying the deposit. He asked the daughter-in-law to pay the instalments, saying that the house would be her property when the mortgage was paid. Before she had completely paid off the mortgage, the father's successor in title sought possession. Held: the daughter-in-law had a contractual licence to remain, and a right to the house on completion of the payments); *Offord v Davies* (1862) 12 CBNS 748 at 753 per Erle CJ; *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231 at 239, [1978] 2 All ER 557 at 561, CA, per Goff LJ, and at 245 and 566 per Brandon LJ.

At all events, even if the rule is as stated in the text, it must be subject to the following limitations: (1) the commencement must be entirely consistent with the requested act, otherwise it is a counter-offer (see para 663

post); (2) completion of performance does not become impossible (*Morrison Shipping Co Ltd v R* (1924) 20 Ll L Rep 283, HL (see para 647 note 5 ante). Moreover, it is arguable that such a view might deprive the offeree of the benefit of a bargain where he has commenced performance before he learns of the offer (see para 665 note 16 post).

## **UPDATE**

### **654-661 Acceptance by promise ... Conditional acceptance**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/658. Alternative modes of acceptance.

### **658. Alternative modes of acceptance.**

The offer may indicate, either expressly or impliedly, that the offeree<sup>1</sup> is to have the choice of accepting either by return promise<sup>2</sup>, or by performance<sup>3</sup>. Thus, the offeror may indicate no preference whatsoever as to the mode of acceptance<sup>4</sup>; or he may indicate a non-exclusive preference for the one mode of acceptance rather than the other<sup>5</sup>; or the terms of the offer may be drafted by the offeree and he may waive the stipulated mode of acceptance<sup>6</sup>. Alternatively, a unilateral contract may become bilateral in the course of performance<sup>7</sup>.

Where an offer of a bilateral contract is impliedly accepted by performance<sup>8</sup>, the issue is whether commencement of performance evinces to the offeror an unequivocal intention to accept<sup>9</sup>, and there is necessarily a communication of any acceptance<sup>10</sup>. The situation is materially different, however, where the offer provides for alternative modes of acceptance: if the offeree chooses to conclude a bilateral contract, communication of acceptance will ordinarily be required<sup>11</sup>; but if he chooses to conclude a unilateral contract, there is the issue of whether there is any contract before the offeree completes performance<sup>12</sup>.

A situation where it may be vital to discover whether the offer permits of alternative modes of acceptance is one such as the following: a 'main contractor' invites a tender from a 'sub-contractor' so that he may quote for the main contract; on the basis of this quote, the contractor successfully bids for the main contract; and the sub-contractor then purports to revoke his tender. There are two possible ways in which the sub-contractor may intend that his tender should be accepted. First, he may evince an intention to enter into a bilateral contract with the contractor, and may even specify the manner of acceptance<sup>13</sup>; and secondly, he may indicate that the contract can be unilateral, in the sense that the contractor should accept by entry into the main contract<sup>14</sup>. Thus, if the sub-contractor's tender is to enter into a unilateral contract, or to enter into either a bilateral or a unilateral contract, he is bound from the moment the contractor enters into the main contract<sup>15</sup>; but if the tender is exclusively to enter into a bilateral contract, he can always revoke before the contractor accepts his offer<sup>16</sup>.

1 The offer may also indicate that it may be accepted by any one of a number of persons. As to who may accept an offer see para 651 ante.

2 See para 654 ante.

3 See para 657 ante.

4 Eg where the buyer orders goods, indicating that the seller can accept either by shipping the goods or by a letter of acceptance, the seller impliedly accepts by shipping the goods, or an instalment thereof: *Lang and Gros Manufacturing Co v Fort Wayne Corrugated Paper Co* 278 F 483 (USA 7th Cir 1921); *Wood and Brooks Co v Hewitt Lumber Co* 89 W Va 254, 109 SE 242 (USA 1921).

5 See eg *Wettern Electrical Ltd v Welsh Development Agency* [1983] QB 796, [1983] 2 All ER 629 (offer contained a formal acceptance slip, which was not returned in time; but offeree went into possession); *Wilson, Smithett & Cape (Sugar) v Bangladesh Sugar and Food Industries Corp* [1986] 1 Lloyd's Rep 378 (letter of intent (which of itself is not usually an acceptance: see para 721 post) required the buyer to put up a performance bond, which was done); *Durasteel Co v Great Lakes Steel Corp* 205 F 2d 438 (USA 8th Cir 1953). See also the cases cited in para 653 note 9 ante. Cf the US *Uniform Commercial Code* s 2-206(1)(b).

6 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA (hire-purchase agreement stipulated to be binding on supplier only by signature; but held accepted by conduct). But compare *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA (similar hire-purchase provision; but not clear

whether supplier's assent transmitted to hirer: see para 654 note 8 ante). See also *Edmund Murray v BSP International Foundations* (1994) 33 ConLR 1, CA.

7 *The Unique Mariner (No 2)* [1979] 1 Lloyd's Rep 37 at 51-52 per Brandon J. Cf para 657 note 23 ante.

8 See para 654 ante.

9 *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666, HL; *Deering Milliken & Co Inc v Drexler* 216 F 2d 116 (USA 5th Cir 1954).

10 As to communication of acceptance see generally para 659 post.

11 See para 654 ante.

12 See para 657 ante.

13 *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241; and see para 654 note 19 ante.

14 See para 657 note 5 ante.

15 See para 650 note 17 ante.

16 See eg *Pigott Structures Ltd v Keillor Construction Co Ltd* [1965] 2 OR 183, 50 DLR (2d) 97, Ont CA. As to revocation of the offer by the offeror see para 644 ante. In such a case, the sub-contractor will be liable in the tort of deceit only where he intended, at the time he made his offer, to revoke it (*Derry v Peek* (1889) 14 App Cas 337, HL) and he is probably not liable for the tort of negligent misstatement (*Holman Construction Ltd v Delta Timber Co Ltd* [1972] NZLR 1081); and see MISREPRESENTATION AND FRAUD.

## UPDATE

### 654-661 Acceptance by promise ... Conditional acceptance

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/659. Communication of acceptance.

### 659. Communication of acceptance.

The general rule is that an acceptance<sup>1</sup> is not communicated until it is actually brought to the notice of the offeror<sup>2</sup>: for example, an attempted oral acceptance is not communicated if it is 'drowned by an aircraft flying overhead'<sup>3</sup>; or if the attempted acceptance is spoken into a telephone or sent on a teleprinter (or, it is suggested, by e-mail) after the line has failed<sup>4</sup>. Where, however, the offeror authorises acceptance by post, acceptance may prima facie be communicated simply by posting a properly addressed letter of acceptance<sup>5</sup>; but the offeror may instead stipulate exclusively for a defined method of communication<sup>6</sup>.

For the formation of a contract<sup>7</sup>, the general rule with regard to the need for communication of acceptance is that acceptance must in fact be communicated<sup>8</sup>. Thus, there is no binding contract where the offeree simply writes his acceptance on a piece of paper which he keeps<sup>9</sup>; or where a company resolves to allocate shares to an applicant but does not inform him<sup>10</sup>; or a committee resolves to appoint to employment the applicant/offeree<sup>11</sup>; or the offeree decides to buy the goods offered but does not inform the offeror/seller<sup>12</sup>; or the offeree communicates his acceptance only to his own agent<sup>13</sup>. However, as the main reason for the rule is said to be that it would be unjust to hold the offeror bound if he did not know that his offer had been accepted<sup>14</sup>, it follows that the offeror may be bound if he knows of the acceptance although it was not communicated to him by the offeree (or the offeree's agent)<sup>15</sup>.

Despite the general requirement that communication must be brought to the notice of the offeror, communication may be deemed to have been made in the following circumstances:

- 23 (1) where there is communication by one who is actually authorised to make it on behalf of the offeree<sup>16</sup>, and/or to one who is actually authorised to receive it on behalf of the offeror<sup>17</sup>; and a fortiori where the agent is the agent of both parties<sup>18</sup>;
- 24 (2) where either party is estopped from denying a good communication, as where the offeror confers on his agent apparent authority to receive the acceptance<sup>19</sup>, or possibly where in negotiations by telephone 'it is his own fault if he did not...' actually receive the acceptance<sup>20</sup>;
- 25 (3) where the offer expressly or impliedly dispenses with the requirement that acceptance be communicated<sup>21</sup>. It would seem that this requirement is merely the inference that is ordinarily drawn from an offer; the offeror will commonly dispense with the requirement in the case of a unilateral contract<sup>22</sup>, though he will not necessarily do so<sup>23</sup>; and he may also dispense with it in the case of bilateral contracts<sup>24</sup>, though there may be difficulty where the offeree purports to accept merely by remaining silent<sup>25</sup>.

1 For the meaning of an acceptance see para 650 ante.

2 Or perhaps his office: see para 644 text and note 19 ante. As to revocation of acceptance see paras 666, 680 post.

3 *Entores v Miles Far East Corpn* [1955] 2 QB 327 at 332, [1955] 2 All ER 493 at 495, CA, obiter per Denning LJ. The reason is that the offeree knows, or ought to know, that the acceptance has not been received: see *Entores v Miles Far East Corpn* supra at 333 and 495 per Denning LJ. Presumably, if the offeror acts as though he received the acceptance, he is estopped from denying receipt.

4 *Entores v Miles Far East Corpn* [1955] 2 QB 327 at 333, [1955] 2 All ER 493 at 495, CA, obiter per Denning LJ. However, if the offeror does not 'catch' the telephoned acceptance, or the ink of the offeror's teleprinter fails, and he does nothing more, the offeror will be estopped from denying receipt: *Entores v Miles Far East Corpn*

supra at 333 and 495 per Denning LJ. See also *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1973] 1 All ER 769 at 787, sub nom *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA, The Brimnes* [1973] 1 WLR 386 at 405 per Brandon J; affd *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA (notice of rescission). See also the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 68.

5 For the time when acceptance by post operates see para 676 post. An alternative explanation is that the offeror has dispensed with communication of acceptance: see note 24 infra.

6 See para 654 ante.

7 Distinguish notice as a condition precedent to contract from notice as a condition precedent merely to performance: see generally para 670 post.

8 *Mozley v Tinkler* (1835) 1 Cr M & R 692; *Ex p Stark, Re Consort Deep Level Gold Mines Ltd* [1897] 1 Ch 575, CA; *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161 at 163-164, [1974] 1 WLR 155 at 157, CA, per Russel LJ; *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796 at 805, [1985] 1 WLR 925 at 937, CA, per Goff LJ. The offeror has almost complete freedom to stipulate for what he wishes by way of an acceptance: see para 653 et seq ante. There is merely a prima facie assumption that he requires communication of acceptance: see further head (3) in the text. For an alternative explanation see para 654 note 3 ante.

9 *Kennedy v Thomassen* [1929] 1 Ch 426 (offeree died after directing her agent to accept); *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666 at 692, HL, obiter per Lord Blackburn. Cf the cases cited in note 13 infra.

10 No allotment ever made: *Best's Case* (1865) 2 De GJ & Sm 650. Allotment made: *Hebb's Case* (1867) LR 4 Eq 9; *Gunn's Case* (1867) 3 Ch App 40; *Challis's Case* (1871) 6 Ch App 266. See further COMPANIES vol 15 (2009) PARA 1090.

11 *Powell v Lee* (1908) 99 LT 284 (where it was held that the board was not bound by an offer communicated by a member of the board who described himself as honorary secretary, as there had been no communication by the board itself. Presumably there would have been communication if the board had held the member out as honorary secretary: see note 15 infra). As to limitation of agent's authority see AGENCY vol 1 (2008) PARA 123.

12 *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34, [1982] 1 All ER 293, HL.

13 *Hebb's Case* (1867) LR 4 Eq 9; *Kennedy v Thomassen* [1929] 1 Ch 426; *Parkette Apartments Ltd v Masternak* [1965] 2 OR 350, 50 DLR (2d) 577 (Ont). For the situation where the agent is the agent of both parties see note 18 infra.

14 *Household Fire and Carriage Accident Insurance Co v Grant* (1879) 4 Ex D 216 at 235, CA, per Bramwell LJ dissenting (the majority reached a different conclusion by applying a special rule for postal acceptances: see para 676 post).

15 See the cases where an applicant for shares received indirect information that they had been allotted to him: *Cookney's Case* (1858) 3 De G & J 170, CA in Ch; *Bloxham's Case* (1864) 4 De GJ & Sm 447, CA in Ch; *Levita's Case* (1867) 3 Ch App 36. But it is not enough merely for the company to put the applicant's name on the register of shareholders: *Gunn's Case* (1867) 3 Ch App 40; and see further COMPANIES. Nor is it sufficient where the offer expressly requires notice of acceptance to the offeror: *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA. Cf indirect revocation of offers: see para 644 note 16 ante.

16 *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241; *British Guiana Credit Corp v Da Silva* [1965] 1 WLR 248, PC.

17 *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241; *Countess of Dunmore v Alexander* (1830) 9 Sh 190, Ct of Sess; and as to the notice of allotment of shares to an agent whom the applicant has authorised to receive that notice see COMPANIES. But distinguish the Post Office, which is merely authorised to carry, not to receive, acceptance: see para 677 post.

18 *Smith v Mansi* [1962] 3 All ER 857, [1963] 1 WLR 26, CA. A solicitor acting for both parties drafted a formal contract for the sale of some land but left the date blank. He sent that contract to the purchaser, who signed and delivered it to the vendor. The vendor signed and delivered it to the solicitor, without revealing that he did not intend thereby to become bound. The completion date was subsequently inserted by the solicitor. Held: (1) the purchaser had made an offer by the delivery of the signed contract to the vendor; (2) as the solicitor was the agent of both parties, there was an enforceable contract made either (a) when the vendor

delivered the signed contract to the solicitor, or (b) when the solicitor filled in the date; and (3) the acceptance was good notwithstanding the vendor's uncommunicated intention that it be conditional. Contrast *Earl v Mawson* (1974) 232 Estates Gazette 1315, CA. As to the statutory formalities now required for a contract effecting a sale or other disposition of an interest in land see para 624 ante; and SALE OF LAND.

For the situation where the common agent makes a mistake see *Thornton v Kempster* (1814) 5 Taunt 786; and see para 661 note 10 post.

19 But not where the third party knows the agent has no actual authority: *Jordan v Norton* (1838) 4 M & W 155; *Loutfi v Czarnikow Ltd* [1953] 2 Lloyd's Rep 213, CA; *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA. But cf *Powell v Lee* (1908) 99 LT 284 (cited in note 11 supra).

20 *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327 at 333, [1955] 2 All ER 493 at 495, CA, obiter per Denning LJ. See also *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1973] 1 All ER 769 at 787, sub nom *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA, The Brimnes* [1973] 1 WLR 386 at 405 per Brandon J; affd *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA (notice of rescission).

21 See eg (1) where there is acceptance by conduct (see para 654 ante); (2) by using goods sent (*Weatherby v Banham* (1832) 5 C & P 228 (but see now the Unsolicited Goods and Services Act 1971; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 657 et seq); (3) by dispatching ordered goods (*Port Huron Machinery Co v Wohlers* 207 Iowa 826, 221 NW 843 (USA 1928)); (4) by a tenant remaining in possession (*Roberts v Hayward* (1828) 3 C & P 432).

22 Eg offers to the world at large to enter into unilateral contracts (see *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA; and para 639 ante); guarantees to enable a third person to obtain goods on credit (see *Morrell v Cowan* (1877) 7 ChD 151, CA; and see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1026); and resolutions by corporations to make up the full salary of any employee who should volunteer for military service (see para 634 note 6 ante). See also *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 181, [1974] 1 All ER 1015 at 1031, PC, obiter per Lord Simon of Glaisdale.

23 Thus, a guarantee to enable a third person to obtain credit may become binding on the extension of credit, though liability be conditional on notice to the guarantor: *Somerfall v Barneby* (1611) Cro Jac 287; *Jones v Williams* (1841) 7 M & W 493; and see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq. On the other hand, this is coming quite close to the bilateral contract, where the offeree actually promises to extend the credit: see *M'Iver v Richardson* (1813) 1 M & S 557; and see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1024. Cf para 654 note 3 ante.

24 *Dominion Building Corpn Ltd v R* [1933] AC 533, PC; and see the cases cited in para 654 notes 8-9 ante. This may be the explanation of those cases where there has been an acceptance by silence plus additional circumstances (see para 656 ante); and also of the postal rule (see para 676 et seq post). But see the view cited in para 654 note 3 ante.

25 See para 655 text to notes 9-15 ante.

## UPDATE

### 654-661 Acceptance by promise ... Conditional acceptance

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/660. Time of acceptance.

**660. Time of acceptance.**

An offer will usually expressly or impliedly prescribe a time within which it must be accepted<sup>1</sup>; and, once that time limit has expired, the offer can no longer be accepted<sup>2</sup>. Thus, the offer may specify the time within which the offeree must complete the designated mode of acceptance<sup>3</sup>. Alternatively, it may go further and require communication of that acceptance to the offeror within the time specified<sup>4</sup>.

- 1 For the meaning of 'acceptance' see para 650 ante.
- 2 As to the lapse of an offer by effluxion of time see para 646 ante.
- 3 As to the modes of acceptance see paras 653-658 ante.
- 4 As to the communication of acceptance see para 659 ante.

**UPDATE**

**654-661 Acceptance by promise ... Conditional acceptance**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/661. Conditional acceptance.

### **661. Conditional acceptance.**

An offer cannot be accepted conditionally; the offeree has power to accept only on the terms stated in the offer<sup>1</sup> and nobody else has any power of acceptance whatsoever<sup>2</sup>. Thus, an attempted acceptance cannot operate as such where it is made subject to some condition<sup>3</sup>, or includes some new or different term<sup>4</sup>; or where the offer is only meant to be accepted by offerees jointly, and is not accepted by all of them<sup>5</sup>. In each of these cases, however, the purported acceptance may amount to a counter-offer<sup>6</sup>, though it will not necessarily do so<sup>7</sup>.

The rule that an acceptance must be unconditional<sup>8</sup> does not necessarily require that there must be a precise verbal correspondence between offer and acceptance<sup>9</sup>. But an acceptance must not introduce any new or different terms<sup>10</sup>; nor leave any material<sup>11</sup> term yet to be agreed<sup>12</sup>; nor may it be made in any manner other than that prescribed in the offer<sup>13</sup>. Thus, if a formal contract is sent for signature together with an 'acceptance' of the offer and the formal contract contains terms which were not referred to in the offer, the result is that there is no such acceptance of the offer as to form a complete contract<sup>14</sup>. The question of whether there has been such an unconditional acceptance is a matter of interpretation<sup>15</sup>, and may frequently involve the construction of a number of communications which have passed between the parties to see if in toto they evince an agreement<sup>16</sup>.

An acceptance may have legal effect, notwithstanding that it may appear to be conditional by reason of any of the following factors:

- 26 (1) the conditional acceptance was in fact an offer, because the apparent offer was only an invitation to treat<sup>17</sup>;
- 27 (2) the new terms apparently introduced by the acceptance are trivial<sup>18</sup>, or are only such as would in any event be implied in fact or in law<sup>19</sup>;
- 28 (3) the offeree indicates that he will show some indulgence in enforcing the promises made by the offeror<sup>20</sup>;
- 29 (4) the acceptance is conditional, but the offer was made subject to the same condition<sup>21</sup>;
- 30 (5) the unconditional acceptance was 'grumbling'<sup>22</sup>, or was accompanied by a request that the offeror put forward better terms<sup>23</sup>, or show some indulgence in enforcing the promises made by the offeree<sup>24</sup>;
- 31 (6) the unconditional acceptance contained a further wholly independent offer<sup>25</sup>, even where the proposed second contract is to discharge the first one<sup>26</sup>;
- 32 (7) even where the offer mentions a preferred mode of acceptance, it may on a proper construction allow for alternative modes of acceptance<sup>27</sup>;
- 33 (8) an agreement is not necessarily invalidated either by the fact that the parties continue negotiations after the formation of a contract<sup>28</sup>, or by the fact that one of them subsequently erroneously interprets its legal effect<sup>29</sup>; but both these factors may be evidence of an intention to repudiate the agreement<sup>30</sup>, or to enter into a novation<sup>31</sup>.

1 For the meaning of 'acceptance' see para 650 ante.

2 As to who may accept see para 651 ante.

3 *Varidex (London) Ltd v Doudney, Blair & Co Ltd* [1953] 2 Lloyd's Rep 521 (negotiations for sale from Hungarians to P to D. P accepted D's offer subject to 'our contract, which will ... be made out on the basis of the Hungarian original'. Held: no acceptance); *Richardson v Greensboro Warehouse and Storage Co* 223 NC 344, 26

SE 2d 897 (USA 1943) (P purported to exercise an option to purchase D's land by an acceptance 'made subject to the approval of the title by our attorneys'. Held: no acceptance, but a counter-offer). See also note 21 infra.

4 See the cases cited in note 10 infra. The same is true in the case of an option: *Reporoa Stores Ltd v Treloar* [1958] NZLR 177, NZ CA; *Reeves v Huffman* (1951) 3 WWR 176, [1951] 4 DLR 324 (Man). As to options see para 640 ante.

5 As to joint promises see para 662 post.

6 As to counter-offers see para 663 post, especially note 5.

7 See *Kingsley and Keith Ltd v Glynn Bros (Chemicals) Ltd* [1953] 1 Lloyd's Rep 211. As to uncertainty see para 667 post.

8 *Warner v Willington* (1856) 3 Drew 523; *Varidex (London) Ltd v Doudney, Blair & Co Ltd* [1953] 2 Lloyd's Rep 521; *Swan v Miller, Son and Torrance Ltd* [1919] 1 IR 151, CA. SEe also *Smith v Mansi* [1962] 3 All ER 857, [1963] 1 WLR 26, CA (offer apparently unconditional), cited in para 659 note 18 ante.

9 *Clive v Beaumont* (1847) 1 De G & Sm 397; *Proprietors of English and Foreign Credit Co Ltd v Arduin* (1871) LR 5 HL 64; *Simpson v Hughes* (1897) 66 LJ Ch 334; *Goffin v Houlder* (1920) 90 LJ Ch 488; *Richardson v Greensboro Warehouse and Storage Co* 223 NC 344, 26 SE 2d 897 (USA 1943), obiter: 'Where the contract . . . is in several writings . . . and not contained in a single document which both parties have executed, the court will not . . . be astute to detect immaterial differences in the phrasing of the offer and acceptance which might defeat the contract, but will try to give each writing a reasonable interpretation under which substantial justice may be reached according to the intent of the parties'. As to the construction of documents see para 772 et seq post.

10 *Jackson v Turquand* (1869) LR 4 HL 305 (offer to buy shares not accepted by an allotment which provided for forfeiture unless payment were made by a specified date). See also conditional acceptances in the following types of case: (1) allotments of shares (see COMPANIES vol 15 (2009) PARA 1089); (2) leases (*Holland v Eyre* (1825) 2 Sim & St 194; and see LANDLORD AND TENANT); (3) sales of goods (see *Hutchison v Bowker* (1839) 5 M & W 535; *Quenerduaine v Cole* (1883) 32 WR 185; *Loutfi v Czarnikow Ltd* [1953] 2 Lloyd's Rep 213, CA; *Northland Airlines Ltd v Dennis Ferranti Meters Ltd* (1970) 114 Sol Jo 845, CA; and also the cases on the delivery of the wrong quantity; and see the Sale of Goods Act 1979 s 30 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 172); (4) sales of land (see *Routledge v Grant* (1828) 4 Bing 653; *Hyde v Wrench* (1840) 3 Beav 334; *Neale v Merrett* [1930] WN 189; *Earl v Mawson* (1974) 232 Estates Gazette 1315, CA; and see SALE OF LAND). As to a variation between bought and sold notes prepared by a common agent see *Thornton v Kempster* (1814) 5 Taunt 786; and see further para 707 note 5 post. As to the effect of referential bids see further para 635 note 3 ante.

11 Mere trivial additions not intended to be part of the bargain will not make the acceptance conditional: *Clive v Beaumont* (1874) 1 De G & Sm 397; *Simpson v Hughes* (1897) 66 LJ Ch 334, CA. Cf the attempt by the offeree to put new terms into the mouth of the offeror: see para 663 note 15 post.

12 *Appleby v Johnson* (1874) LR 9 CP 158. See further para 667 post.

13 See paras 653-658 ante.

14 *Crossley v Maycock* (1874) LR 18 Eq 180; *Jones v Daniel* [1894] 2 Ch 332; *Clark v Robinson* (1903) 51 WR 443.

15 As to the rules of interpretation see para 772 et seq post.

16 See eg *Hussey v Horne-Payne* (1879) 4 App Cas 311, HL; *Bristol, Cardiff, and Swansea Aerated Bread Co v Maggs* (1890) 44 ChD 616; *Varidex (London) Ltd v Doudney, Blair & Co Ltd* [1953] 2 Lloyd's Rep 521; *Smith v Mansi* [1962] 3 All ER 857, [1963] 1 WLR 26, CA; *Peter Darlington Partners Ltd v Goshco Co Ltd* [1964] 1 Lloyd's Rep 149; *British Guiana Credit Corp v Da Silva* [1965] 1 WLR 248, PC; *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711, [1971] 3 All ER 16, CA; *Hofflinghouse & Co Ltd v C-Trade SA, The Intra Transporter* [1986] 2 Lloyd's Rep 132, CA. See also *Pigott Structures Ltd v Keillor Construction Co Ltd* [1965] 2 OR 183, 50 DLR (2d) 97, Ont CA. As to contracts by correspondence see para 668 post; and as to provisional contracts see para 669 post.

17 See eg para 656 note 11 ante.

18 See eg *Nelson Equipment Co v Harner* 191 Ore 359, 230 P 2d 188; 24 ALR 2d 999 (USA 1951) (offer to tender delivery a short time earlier than that fixed in the contract held not a counter-offer).



19 *Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346; *Shea v Second National Bank of Washington* 76 US App DC 406, 133 F 2d 17 (USA 1942); *Machine Tool and Equipment Corp v Reconstruction Finance Corp* 131 F 2d 547 (USA 9th Cir 1942); *Pickett v Miller* 76 Nm 105, 412 P 2d 400 (USA 1966). As to implied terms see generally para 778 et seq post.

Similarly, where the offeree makes his acceptance conditional upon the offeror recognising certain legal rights in the offeree that would in fact be created by his unconditional acceptance, eg in reply to an offer to buy goods, the seller stipulates for cash on delivery: see the Sale of Goods Act 1979 s 28. For lack of exact correspondence in international sales see the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) done at Vienna, 11 April 1980; Misc 24 (1980); Cmd 8074, art 19(2); and para 684 note 33 post. At the date at which this volume states the law, the Vienna Convention had not been ratified in the United Kingdom.

20 *Harris' Case* (1872) 7 Ch App 587 (allotment of shares stipulating for interest for late payment); and see further COMPANIES vol 15 (2009) PARA 1090. As to waiver see para 1025 et seq post.

21 There is then a consensus ad idem; and the issue is whether this conditional agreement amounts to a binding contract, as to which see para 670 post.

22 *Brangier v Rosenthal* 337 F 2d 952 (USA 9th Cir 1964) (purchaser grumbled at vendor's proposals to avoid government restrictions but nevertheless gave clear and unqualified consent).

23 *Braun v Camas Prairie Rly Co* 72 Idaho 83, 237 P 2d 604 (USA 1951). Cf *Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346 (where the request preceded the acceptance: see further para 663 note 15 post).

24 *Harris's Case* (1872) 7 Ch App 587.

25 *Toulmin v Millar* (1887) 3 TLR 836, HL (right of estate agent to commission). It is a question of intention whether the reply is a conditional acceptance, or an unconditional acceptance plus a further offer: see *Varidex (London) Ltd v Doudney, Blair & Co Ltd* [1953] 2 Lloyd's Rep 521.

26 See eg *Tinn v Hoffmann & Co* (1873) 29 LT 271, Ex Ch (see para 663 note 15 post); *Deering Milliken & Co Inc v Drexler* 216 F 2d 116 (USA 5th Cir 1954) (see para 634 note 12 ante). Again, it is a question of fact whether the reply is a conditional acceptance, or an unconditional acceptance plus an offer of a novation. As to novation see para 1036 et seq post.

27 As to alternative modes of acceptance see para 658 ante.

28 See the cases cited in para 650 note 21 ante.

29 *Wilding v Sanderson* [1897] 2 Ch 534, CA; *Peter Darlington Partners Ltd v Gosho Co Ltd* [1964] 1 Lloyd's Rep 149; *Reporoa Stores Ltd v Treloar* [1958] NZLR 177 at 181, 190, 208, NZ CA, obiter.

30 As to repudiation see para 997 et seq post.

31 As to novation see para 1036 et seq post.

## UPDATE

### 654-661 Acceptance by promise ... Conditional acceptance

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 661 Conditional acceptance

NOTE 20--See *Society of Lloyd's v Twinn* (2000) Times, 4 April, CA (clear unconditional acceptance was effective).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/662. Joint promises.

### **662. Joint promises.**

Where a promise is intended to be made by several persons jointly, if any one of those persons fails to enter into the agreement, or to execute the instrument of the agreement, there is no contract, and no liability is incurred by such of them as have entered into the agreement<sup>1</sup>. The same rule applies if, when executing such an instrument, a party introduces a limitation of his liability to which the other parties have not agreed<sup>2</sup>. The rule already stated has no application in a case of a contract validly made by an agent on behalf of his absent principals<sup>3</sup>; for instance, where a contract is made by a partner on behalf of his firm, for every partner is an agent of the other partners for the purpose of the firm's business<sup>4</sup>.

Similarly, where a promise is intended to be made to several persons jointly, if any of the joint promisees fails to enter into the agreement the others cannot enforce it as a contract made with them alone<sup>5</sup>; but in the case of a contract made by deed, a covenant may be enforced, notwithstanding that the deed has not been executed by some of the joint covenantees, in the absence of evidence that they did not assent to the covenant, for in such a case their assent is presumed from the fact that they join in suing on the covenant<sup>6</sup>.

<sup>1</sup> *Underhill v Horwood* (1804) 10 Ves 209 at 226; *Jones v Williams* (1836) 5 LJ Ch 253; *Latch v Wedlake* (1840) 11 Ad & El 959; *Bonser v Cox* (1841) 4 Beav 379; *Evans v Bremridge* (1856) 8 De GM & G 100; *McClean v Kennard* (1874) 9 Ch App 336; *Royal Albert Hall Corpn v Winchilsea* (1891) 7 TLR 362 at 366, CA, per Kay LJ; *Coopers v United Contract Corpn Ltd and Danziger* (1897) 14 TLR 29 (agreement executed by seven members of syndicate of eight); *National Provincial Bank of England v Brackenbury* (1906) 22 TLR 797 (guarantee signed by three out of four guarantors).

As to conditional agreements generally see para 670 post; and as to joint promises generally see para 1079 et seq post.

<sup>2</sup> *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75.

<sup>3</sup> See further AGENCY vol 1 (2008) PARA 125.

<sup>4</sup> See the Partnership Act 1890 s 5; and see further PARTNERSHIP vol 79 (2008) PARA 45 et seq.

<sup>5</sup> *Wetherell v Langston* (1847) 1 Exch 634; *Hornsby v Bird* (1869) 36 LJ Ch 244. See also *Real Estate Center Ltd v Ouellette* (1974) 47 DLR (3d) 568, New Brun SC.

<sup>6</sup> *Petrie v Bury* (1824) 3 B & C 353; *Rose v Poulton* (1831) 2 B & Ad 822; *Wetherell v Langston* (1847) 1 Exch 634. As to deeds of arrangement see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 871 et seq.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iii) Acceptance/663. Counter-offers.

### 663. Counter-offers.

In the course of negotiating a contract, there may first be invitations to treat<sup>1</sup>; then one party may make a definite offer<sup>2</sup>; and the other party may reply that he is willing to be bound on terms which differ materially<sup>3</sup> from those contained in the offer<sup>4</sup>. This last declaration is not an acceptance<sup>5</sup> but a counter-offer<sup>6</sup> which may itself be accepted by the previous offeror<sup>7</sup>. To amount to a counter-offer, a declaration must be legally operative as an offer<sup>8</sup>; and it will usually put an end to the previous offer<sup>9</sup>. Thus, a mere inaccurate attempt to reduce a prior oral agreement to writing is not a counter-offer<sup>10</sup>.

Frequently, the terms of a counter-offer are not spelt out in a single communication, but are to be gathered from the previous negotiations between the parties, including any previous offers and counter-offers<sup>11</sup>. There is, however, no counter-offer unless it creates a power of acceptance in the previous offeror<sup>12</sup>; and that acceptance will commonly be found in a commencement of performance<sup>13</sup>, or even possibly by silence<sup>14</sup>. A counter-offer must be distinguished from an inquiry, request or suggestion which does not itself proffer any new terms on which the offeree is willing to be bound, but merely seeks either (1) further elucidation of the meaning or terms of the offer; or (2) to put additional or different terms into the mouth of the offeror<sup>15</sup>.

Prima facie, a counter-offer will determine the power to accept the previous offer<sup>16</sup>. It follows that the previous offer cannot subsequently be accepted<sup>17</sup>, unless it has been expressly or impliedly renewed by the offeror<sup>18</sup>. However, a counter-offer will not determine that power to accept (a) where the previous offer was an option<sup>19</sup>, though the counter-offer may itself be accepted<sup>20</sup>; or (b) probably, where it is expressly or impliedly stipulated that the counter-offer is not to have such an effect, either by the offeror in his previous offer<sup>21</sup>, or by the offeree in his counter-offer<sup>22</sup>; or (c) where it is not regarded as introducing a new term into the bargain<sup>23</sup>.

1 As to invitations to treat see para 633 ante.

2 As to the meaning of an offer see para 632 ante.

3 But precise verbal correspondence is not required: see para 661 note 9 ante.

4 This amounts to a conditional acceptance, as to which see para 661 ante.

5 *Tinn v Hoffman & Co* (1873) 29 LT 271; *North West Leicestershire District Council v East Midlands Housing Association* [1981] 3 All ER 364, [1981] 1 WLR 1396 (involving unauthorised mistake). For the meaning of 'acceptance' see para 650 ante.

6 *Lovely & Orchard Services Ltd v Daejan Investments (Grove Hall) Ltd* [1978] 1 EGLR 44. The term 'counter-offer' is frequently used synonymously with 'conditional acceptance'. However, whilst a counter-offer is a conditional acceptance (see para 661 note 10 ante), a conditional acceptance is not necessarily a counter-offer: *Pigott Structures Ltd v Keillor Construction Co Ltd* [1965] 2 OR 183 at 192, 50 DLR (2d) 97 at 107, Ont CA, per McGillivray JA. Cross-offers are not counter-offers: see para 665 note 14 post. But as to international sales see para 684 note 33 post.

7 Eg in the case of contracts of the following types: (1) insurance (*Xenos v Wickham* (1866) LR 2 HL 296; and see further INSURANCE); (2) allotments of shares (see COMPANIES vol 15 (2009) PARA 1088); (3) the battle of the forms (see para 664 post). See also the following cases: *Lucas v James* (1849) 7 Hare 410; *British Road Services Ltd v Arthur V Crutchley & Co Ltd* [1968] 1 All ER 811, CA; *Star Fire and Burglary Insurance Co v Davidson & Sons* (1902) 5 F 83, Ct of Sess; *Roberts and Cooper Ltd v Salvesen & Co* 1918 SC 794; *Swan v Miller, Son and Torrance Ltd* [1919] 1 IR 151, CA (introduction of new term as to payment of ground rent); *Wheeler v Jeffery* [1921] 2 IR 395 (introduction of new term by stating date of commencement of agreed agency).

8 See the text to note 12 *infra*.

9 See the text to notes 16-23 *infra*.

10 The writing may be rectifiable: see eg *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545.

11 See eg *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666, HL; *A Davies & Co (Shopfitters) Ltd v William Old Ltd* (1969) 67 LGR 395; *Parkette Apartments Ltd v Masternak* [1965] 2 OR 350, 50 DLR (2d) 577 (Ont).

12 See eg *Bishop and Baxter Ltd v Anglo-Eastern Trading and Industrial Co Ltd* [1944] KB 12, [1943] 2 All ER 598, CA (the term introduced by the counter-offer was too uncertain to be accepted). See further para 672 *post*.

13 See eg *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666, HL; and see the cases cited in para 656 note 12 *ante*. However, this will not be the case where the person making the counter-offer knows that the original offeror is unaware that the acceptance is conditional: *R Simon & Co Ltd v Peder P Hedegaard AS* [1955] 1 Lloyd's Rep 299.

14 See the cases cited in para 656 note 10 *ante*.

15 *Tinn v Hoffmann & Co* (1873) 29 LT 271, Ex Ch (to D's offer to sell 800 tons of iron, P replied 'If I made the quantity 1200 tons ... I suppose you would make the price lower'); *Stevenson, Jaques v McLean* (1880) 5 QBD 346 (to D's offer to sell goods, P replied inquiring whether D would allow credit).

16 See eg *Hyde v Wrench* (1840) 3 Beav 334; *Thornbury v Beville* (1842) 1 Y & C Ch Cas 554; *Sellars v Easthope* (1948) 99 L Jo 290, county court; *Khaled v Athenas Bros (Aden) Ltd* [1968] EA 31, PC. This is said to be because a counter-offer amounts to a rejection of the previous offer (as to rejection of offers see para 645 *ante*); but there seems to be no reason in principle why an offeree should not be able to make it clear in his counter-offer that that counter-offer is not intended as a rejection of the previous offer: see further the text to notes 21-22 *infra*.

17 *Hyde v Wrench* (1840) 3 Beav 334; *Tinn v Hoffmann & Co* (1873) 29 LT 271, Ex Ch, especially at 278 per Brett J (D's letter of 28 November 1871 rejecting the counter-offer did not reopen D's offer of 24 November 1871).

18 See the cases cited in para 645 note 7 *ante*.

19 *Reporoa Stores Ltd v Treloar* [1958] NZLR 177 at 180, NZ CA, obiter per Barrowclough CJ. As to options see generally para 640 *ante*.

20 *Reporoa Stores Ltd v Treloar* [1958] NZLR 177 at 181, 188, 203, NZ CA, obiter; *Reeves v Huffman* (1951) 3 WWR 176, [1951] 4 DLR 324 (Man), obiter; *Carello v Jordan* [1935] QSR 294 at 332 (Qld), obiter per EA Douglas J.

21 *Quinn v Feaheny* 252 Mich 526, 233 NW 403 (USA 1930). Cf para 645 note 8 *ante*.

22 *Monvia Motorship Corp'n v Keppel Shipyard (Private) Ltd, The Master Stelios* [1983] 1 Lloyd's Rep 356, PC. Cf the American Law Institute's *Restatement of the Law of Contracts* (2d) (1981) s 39.

23 *Global Tankers Inc v Amercoat Europa NV* [1975] 1 Lloyd's Rep 25 at 28. Alternatively, it may be regarded as making an offer of a second contract: see para 661 note 26 *ante*.

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#### **664. The battle of the forms.**

In modern times, the principles with regard to counter-offers<sup>1</sup> have been applied to what has become known as the 'battle of the forms'<sup>2</sup>; that is, where one or both parties try to contract by reference to one or more standard forms of contract<sup>3</sup>. Where only one party (the proferens) is trying to put forward a standard form as part of his offer or counter-offer, there is the preliminary issue of whether the proferens has incorporated that standard form in his terms<sup>4</sup>. However, where each party incorporates a different and materially conflicting set of standard terms in his proposal<sup>5</sup>, the second set proffered may be a counter-offer; and this may be accepted by conduct without any further communication between the parties<sup>6</sup>. This result gives rise to the 'last shot' doctrine<sup>7</sup>; that is, where in a series of communications each party continuously puts forward his own terms, even though they embark on performance, the final document put forward (the last counter-offer) may be accepted by conduct<sup>8</sup>. However, it would seem possible to avoid losing this battle of the forms by either rejecting the last counter-offer<sup>9</sup>; or by continued exchange of forms throughout performance<sup>10</sup>.

1 See para 663 ante.

2 See *Butler Machine Tool Co Ltd v Ex-Cell-O Corpn* [1979] 1 All ER 965 at 966, [1979] 1 WLR 401 at 402, CA, per Lord Denning MR.

3 As to standard form contracts see para 771 post. As to price escalation clauses in consumer contracts see para 794 head (12) post.

4 See para 685 et seq post. Distinguish the situation where the reference to the standard terms is meaningless: *Nicolene Ltd v Simmonds* [1953] 1 QB 543, [1953] 1 All ER 822, CA (reference to the 'usual conditions of acceptance'; there were none. Held: the meaningless reference should be ignored); and see para 673 post.

5 Distinguish the situation where each party incorporates the same standard form, eg the usual practice on a sale of land: see para 671 post.

6 *Wettern Electricity Ltd v Welsh Development Agency* [1983] QB 796, [1983] 2 All ER 629; *Sauter Automation v Goodman (Mechanical Services) (in liquidation)* (1986) 34 BLR 81; *Aries Powerplant Ltd v ECE Systems Ltd* (1996) 45 ConLR 111.

7 See *Butler Machine Tool Ltd v Ex-Cell-O Corpn* [1979] 1 All ER 965 at 968, [1979] 1 WLR 401 at 404-405, CA, per Lord Denning MR.

8 *Butler Machine Tool Ltd v Ex-Cell-O Corpn* [1979] 1 All ER 965, [1979] 1 WLR 401, CA (by way of counter-offer, buyer sent his own terms, with a tear-off slip referring thereto and to be signed by seller. Seller signed and returned slip, together with a letter saying he was 'entering' the order 'in accordance with' his offer. Held: seller had accepted buyer's counter-offer, as his letter did not re-incorporate his terms back into the contract). The decision might have been otherwise, had the seller's letter done so. But see *Kingsley and Keith v Glynn Bros (Chemicals)* [1953] 1 Lloyd's Rep 211.

As to acceptance of a bilateral contract by conduct see para 654 ante; as to where there is a partially executed agreement see para 675 post.

9 See para 645 ante.

10 See para 650 ante. The difficulty then is to determine what the terms of the contract (if any) are: see para 675 post.

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### **665. Acceptance in ignorance of the offer.**

Whilst there is authority which seems to suggest the contrary<sup>1</sup>, it should follow from the meaning of 'acceptance'<sup>2</sup> that there cannot be a valid acceptance made in ignorance of the offer: for instance, a person cannot accept the offer of a reward<sup>3</sup> by performance of the requested act without knowledge of the offer<sup>4</sup>; and there should be no contract where two parties each simultaneously make identical offers to the other<sup>5</sup>. The reason is that the parties must actually or apparently reach agreement<sup>6</sup>, either personally or through their agents<sup>7</sup>.

On this basis, the crucial factor is the intention of the offeree to accept the offer; so long as the offeree actually, or apparently<sup>8</sup>, intends to accept the offer at the time he does the act of acceptance<sup>9</sup>, it is irrelevant that his predominant motive in so doing is not the desire to contract<sup>10</sup>. However, an admission by the offeree that at the time he so acted he had forgotten the offer would be fatal to his claim<sup>11</sup>, as should an admission that he was wholly motivated by factors other than the offer<sup>12</sup>.

On the other hand, it may be that contracts are not always formed by the machinery of offer and acceptance<sup>13</sup>. It may be that, so long as the wishes of the parties coincide, there may be, contrary to what is stated above, a contract in the following cases: where two persons simultaneously post identical offers to each other<sup>14</sup>; or where, in the presence of each other, they simultaneously agree to the terms proposed by a third, whether that assent be oral or by the signing of duplicate copies<sup>15</sup>. Indeed, it may even be that an offer of a reward can be accepted in ignorance of the offer<sup>16</sup>.

1 *Gibbons v Proctor* (1891) 64 LT 594, 55 JP 616, DC (but see note 7 infra); cf *Neville v Kelly* (1862) 12 CBNS 740.

2 See para 650 ante.

3 As to offers to the world at large see generally para 639 ante.

4 *Leon J Mitchell (Furs) v Toplis and Harding* [1954] CLY 612; *Fitch v Snedaker* 38 NY 248 (USA 1868); *Arkansas Bankers' Association v Ligon* 174 Ark 234, 295 SW 4, 53 ALR 534 (USA 1927); and see further the 'majority view' cases cited in the ALR annotation to this case; *Bloom v American Swiss Watch Co* [1915] App D 100, SA. Cf the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) ss 23, 51. As to performance with knowledge of the offer see para 657 note 2 ante.

5 *Tinn v Hoffmann & Co* (1873) 29 LT 271 at 277, Ex Ch, per Grove J, at 278 per Brett J, and at 279 per Blackburn J (the decision was by a majority of five to two; and, of that five, the above-mentioned thought that, even if the two letters of 28 November 1871 were cross-offers, cross-offers could not conclude a contract, whilst Archibald and Keating JJ held that the two letters contained diverse terms. However, Brett J did point out (at 278) that an oral contract would not be nullified where the two written confirmations crossed in the post).

The position is different where each party knows the other intends to contract, and also the precise terms on which that other intends to contract: see para 671 post.

6 As to the requirement of agreement see generally para 631 ante.

7 This may be the explanation of *Gibbons v Proctor* (1891) 64 LT 594, sub nom *Gibson v Proctor* (1891) 55 JP 616, DC, ie at the time when the information reached Penn (to whom the offeror of the reward requested that the information be given), the plaintiff knew of the offer: see 55 JP 616, DC. But see further note 16 infra.

8 This may be the explanation of *Upton-on-Severn RDC v Powell* [1942] 1 All ER 220, CA (see para 651 note 17 ante; and see further note 12 infra); but for another explanation see para 618 note 11 ante.

9 As to the modes in which an offeree may accept an offer see paras 653-658 ante.

10 *Williams v Carwardine* (1833) 5 C & P 566 (it is clear that the plaintiff knew of the offer at the time she gave the requested information: see at 574): see also *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484 at 489 per Hawkins J; affd [1893] 1 QB 256, CA. But see further note 12 infra.

11 *R v Clarke* (1927) 40 CLR 227, Aust HC. Contra *Simmons v United States* 308 F 2d 160 (USA 4th Cir 1962).

12 *Taylor v Allon* [1966] 1 QB 304 at 311, [1965] 1 All ER 557 at 559 obiter per Lord Parker CJ; *Fallick v Barber* (1813) 1 M & S 108; *R v Clarke* (1927) 40 CLR 227, Aust HC; contra *Upton-on-Severn RDC v Powell* [1942] 1 All ER 220, CA (the offeree believed that he was under a public duty to help the offeror, and could not charge for his services).

13 See para 631 note 1 ante.

14 *Tinn v Hoffmann & Co* (1873) 29 LT 271 at 275, Ex Ch, per Honyman J (see note 5 supra); *Morris Asinoff & Sons v Freudenthal* 195 App Div 79, 186 NYS 383 (USA 1921); affd 233 NY 564, 135 NE 919 (USA 1922). It seems clear that cross-offers are not counter-offers (see para 663 note 6 ante), and that each party may, at very least, accept the offer of the other: *Tinn v Hoffmann & Co* supra at 279 obiter per Blackburn J. Moreover, the capacity of cross-offers to form a contract may, at least in some cases, depend on the nineteenth century view that a posted offer dates from posting: see para 642 ante.

15 Eg the sort of facts which might arise in the circumstances of the cases cited in para 631 note 1 ante. Distinguish the situation where the signatories are not in the presence of each other, and/or where the parties intend an exchange of signed documents: see para 671 post.

16 See the cases cited in note 1 supra, and in the 'minority view' in the annotation to *Arkansas Bankers' Association v Ligon* 53 ALR 534 at 543 (USA 1927). Even more difficult is the situation where the offeree has partly performed the requested act when he discovers the offer, because of the difficulty of deciding what constitutes an acceptance: see para 657 text to notes 20-26 ante. Contra the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 51.

However, the view here canvassed may be supported by the nineteenth century opinion on the operative date of an offer: see para 642 ante.

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### **666. Revocation of acceptance.**

The general rule is that acceptance must be communicated to the offeror before it is effective<sup>1</sup>. Leaving aside acceptance sent by post<sup>2</sup>, it follows that, *prima facie*, the offeree may revoke his acceptance at any time before it is communicated to the offeror<sup>3</sup>; but there are some exceptional cases. First, where the offeror of a bilateral contract expressly or impliedly dispenses with communication of acceptance, there can be no question of revocation of acceptance<sup>4</sup>. Secondly, where the offeror of a unilateral contract exceptionally requires communication of acceptance<sup>5</sup>; the issue of revocation of acceptance may be relevant where he 'offers' an act in return for a promise<sup>6</sup> in so far as that promise may under the general rule be revoked before it is communicated<sup>7</sup>; but where he offers a promise in return for an act, the rules for revocation of acceptance are irrelevant because the offeree will never make any promise<sup>8</sup>.

1 See para 659 ante.

2 As to revocation of posted acceptances see para 680 post.

3 *Re National Savings Bank Association, Hebb's Case* (1867) LR 4 Eq 9.

4 See para 659 note 24 ante.

5 See para 659 note 23 ante.

6 See para 657 text to notes 14-15 ante.

7 This must be true on general principles; but it will rarely have any significance as in the usual cases there will be a communication of acceptance at the moment of acceptance or dispensation with the requirement of communication of acceptance.

8 The difficulties over revocation of offer (as to which see para 657 text to notes 20-26 ante) are irrelevant here.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iv) Incomplete Agreements/667. The general rule.

#### **(iv) Incomplete Agreements**

##### **667. The general rule.**

To constitute a binding contract there must be a concluded bargain; and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties<sup>1</sup>. This requirement may be expressed by way of a general rule that for the parties to be bound they must have finished reaching an agreement, so that it is possible to infer an intention on the part of both of them to be bound immediately<sup>2</sup>. It follows that, *prima facie*, there is no concluded contract where further agreement is expressly required, as where an agreement for the sale of tentage provided that the price, dates of payment and manner of delivery were to be agreed from time to time<sup>3</sup>. Similarly, if the parties have reached agreement in principle only, it may be that the proper inference is that they have not yet finished agreeing, for instance: where they make their agreement 'subject to details'<sup>4</sup>, or subject to contract<sup>5</sup>; or where so many important matters are left uncertain that their agreement is incomplete<sup>6</sup>; or where the agreement is expressed as a mere understanding<sup>7</sup>; or where, on the appointment of directors to a three-year service agreement at a specified salary, a company resolves to request the company's solicitor to prepare service agreements<sup>8</sup>; or where the parties reach agreement by telephone, but clearly contemplate that one shall send the other a more elaborate written contract<sup>9</sup>; or where the parties simply agree to negotiate in good faith<sup>10</sup>. This general rule is sometimes expressed in the form that a contract to make a contract is not binding<sup>11</sup>; but this is misleading<sup>12</sup>, because at common law a contract to make a contract may well be binding<sup>13</sup>.

On the other hand, an agreement may be complete although it is not worked out in meticulous detail<sup>14</sup>. Indeed, the parties may make it clear that, whilst they intend subsequently to enter into a detailed formal agreement, it is their intention that the provisional agreement be immediately binding<sup>15</sup>. However, whether or not the parties intend a subsequent formal agreement, an outline agreement may achieve sufficient certainty for that agreement to be complete by reason of the maxim that that which is capable of being made certain is to be treated as certain<sup>16</sup>: for instance, because the details not settled by the parties may be determined by recourse to reasonable implied terms<sup>17</sup>, or usage<sup>18</sup>, or by means of a reference to a third party<sup>19</sup>; or because extrinsic evidence renders certain that which the terms of the written agreement between the parties left in doubt<sup>20</sup>; or because the apparently uncertain terms are, in fact, meaningless<sup>21</sup>. Furthermore, the courts are the more ready to find a concluded contract where the alleged contract is a commercial one<sup>22</sup>, or is partially executed<sup>23</sup>; and *a fortiori* where both factors are present<sup>24</sup>.

To decide whether or not an agreement is complete, it may be necessary to look beyond a simple offer and apparent acceptance to the whole of the negotiations between the parties<sup>25</sup>.

1 *May and Butcher Ltd v R* (1929) [1934] 2 KB 17n at 21, HL, per Viscount Dunedin.

2 *Hussey v Horne-Payne* (1879) 4 App Cas 311, HL; *May v Thomson* (1882) 20 ChD 705, CA; *Morrell v Studd and Millington* [1913] 2 Ch 648; *Love and Stewart Ltd v S Instone & Co Ltd* (1917) 33 TLR 475, HL; *British Homophone Ltd v Kunz and Crystallite Gramophone Record Manufacturing Co Ltd* (1935) 152 LT 589; *Zarati Steamship Co Ltd v Frames Tours Ltd* [1955] 2 Lloyd's Rep 278; *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426; *Hofflinghouse & Co v C-Trades SA, The Intra Transporter* [1986] 2 Lloyd's Rep 132, CA. See also *Ridgway v Wharton* (1856) 6 HL Cas 238; *Rummens v Robins* (1865) 3 De GJ & Sm 88; *Shackleford's Case* (1866) 1 Ch App 567; *Bertel v Neveux* (1878) 39 LT 257; *Sociedade Portuguesa de Navios Tanques Lda v Hvalfangerselskapet Polaris AS* [1952] 1 Lloyd's Rep 407, CA; *Newman Industries Ltd v Indo-British Industries*

*Ltd* [1957] 1 Lloyd's Rep 211, CA; *Dawson v Helicopter Exploration Co Ltd* [1955] SCR 868, [1955] 5 DLR 404, Can SC.

As to intention to create legal relations see generally para 718 et seq post.

3 *May and Butcher Ltd v R* (1929) [1934] 2 KB 17n, HL. But compare *Superior Overseas Development Corp v British Gas Corp* [1982] 1 Lloyd's Rep 262, CA (see para 675 note 6 post). See also *Loftus v Roberts* (1902) 18 TLR 532, CA; *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297, CA; *Chamberlain v Boodle & King* [1982] 3 All ER 188, [1982] 1 WLR 1443, CA; *Pagnan SpA v Granaria BV* [1986] 2 Lloyd's Rep 547, CA; *Orion Insurance plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239, CA; *Re WG Apps & Sons Pty Ltd and Hurley* [1949] VLR 7 (Vict); *Summergreene v Parker* (1950) 80 CLR 304, Aust HC; *Cherewick v Moore and Dean* [1955] 2 DLR 492 (BC); *Stocks and Holdings (Constructors) Pty Ltd v Arrowsmith* (1964) 112 CLR 646, Aust HC. But see *Prior v Payne* (1950) 23 ALJ 298, Aust HC, where there was an option at a price to be based on valuation by a third party or mutually agreed which was held to be a contract (see the text to note 17 infra; and para 674 note 11 post). See also *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234 (under which tender had been accepted).

4 *CPC Consolidated Pool Carriers GmbH v CTM Cia Transmediterranea SA, The CPC Gallia* [1994] 1 Lloyd's Rep 68. As to provisional and conditional agreements see respectively paras 669-670 post.

5 See para 671 post.

6 *Harvey v Pratt* [1965] 2 All ER 786, [1965] 1 WLR 1025, CA; *Re Day's Will Trusts, Lloyds Bank Ltd v Shafe* [1962] 3 All ER 699, [1962] 1 WLR 1419; *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 2 All ER 283, [1976] 1 WLR 591, CA; *Palmer v Sandwell MBC* (1987) 20 HLR 74, CA; *Diamond Developments Ltd v Crown Assets Disposal Corp* [1972] 4 WWR 731, 28 DLR (3d) 207 (BC).

7 *JH Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894, [1966] 1 WLR 1582. See also paras 631 note 6 ante, 722 note 8 post.

8 *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099, CA.

9 *JH Saphir (Merchants) Ltd v AL Zissimos (t/a Cyprus Soil Products Co)* [1960] 1 Lloyd's Rep 490.

10 *Walford v Miles* [1992] 2 AC 128, [1992] 1 All ER 453, HL; and see para 641 ante.

11 See eg *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at 289 per Parker J.

12 *Chillingworth v Esche* [1924] 1 Ch 97 at 113, CA, per Sargant LJ; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 515, HL, per Lord Wright.

13 Eg (1) binding provisional agreements (see para 669 post); (2) contracts of option and first refusal (see paras 640-641 ante). Cf the decisions on partly-executed agreements: see para 675 post. There are, however, statutory exceptions to the rule stated in the text, eg the Consumer Credit Act 1974 s 59(1); and see CONSUMER CREDIT para 159 ante.

14 *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 at 205, CA; *Malcolm v Chancellor etc of the University of Oxford* [1991] CLY 521, CA (publisher's oral commitment to publish a book; held: binding).

15 See para 669 post.

16 *le certum est quod certum reddi potest*: see *Love and Stewart Ltd v S Instone & Co Ltd* (1917) 33 TLR 475 at 476, HL, per Lord Loreburn; *May and Butcher Ltd v R* (1929) [1934] 2 KB 17n at 21, HL, per Viscount Dunedin; *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 515, HL, per Lord Wright.

17 Eg (1) the sale of goods (see the Sale of Goods Act 1979 s 8(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 56); (2) supply of services (see *Donwin Productions Ltd v EMI Films Ltd* [1984] CLY 365; the Supply of Goods and Services Act 1982 s 15(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 99); cf *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, [1960] 3 All ER 503, HL; *Hart v Hart* (1881) 18 ChD 670 ('usual covenants'); *Perry v Suffields Ltd* [1916] 2 Ch 187, CA; and see SALE OF LAND. As to implied contracts to pay quantum meruit see para 618 ante; as to implied terms generally see para 778 et seq post; and as to trade custom see further para 674 note 17 post. The courts have not, however, always been willing to assume that businessmen would act reasonably: *King v King* (1980) 41 P & CR 311 (rent review clause).

18 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA.

19 Eg by arbitration (see *Arcos Ltd and Russo-Norwegian Onega Wood Co v Aronson* (1930) 36 Ll L Rep 108); or under the Sale of Goods Act 1979 s 9(1) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 60). See also *Baber v Kenwood Manufacturing Co*; *Whinney Murray & Co* [1978] 1 Lloyd's Rep 175, CA; *Calvan Consolidated Oil and Gas Co Ltd v Manning* [1959] SCR 253, 17 DLR (2d) 1, Can SC; *Prior v Payne* (1950) 23 ALJ 298, Aust HC (see note 3 supra); *Nelson Equipment Co v Harner* 191 Ore 359, 230 P 2d 188; 24 ALR 2d 999 (USA 1951).

20 *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, [1992] BCC 270, CA (agreement to finance sales provided goods complied with warranties).

21 As to extrinsic evidence to cure uncertainty see para 690-700 post; as to meaningless terms see para 673 post.

22 See para 674 post.

23 See para 675 post.

24 See eg *Mitsui Babcock Energy Ltd v J Brown Engineering Ltd* [1997] 6 CL 120 (contract to construct generators for a new power station; parties could not agree on the nature of performance; so contract signed with annotation against performance tests 'to be discussed and agreed'; work proceeded on basis that there was a binding contract. The court refused a declaration that there was no contract from the outset, or that any contract was rendered void for uncertainty by subsequent failure to agree performance tests).

25 As to contracts by correspondence see para 668 post. For the meaning of an offer see para 632 ante; and for the meaning of 'acceptance' see para 650 ante.

## UPDATE

### 667 The general rule

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 9--See *Jordan Grand Prix Ltd v Vodafone Group plc* [2003] EWHC 1956 (Comm), [2003] 2 All ER (Comm) 864.

NOTES 10-13--See *Wellington CC v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486, NZCA (on facts, contract was clearly unenforceable since there was no clear picture of either party's obligations other than general acceptance that negotiations would be in good faith).

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### 668. Contracts by correspondence.

If a contract depends on a series of letters or other documents, and it appears from them that the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether there is no binding agreement until the instrument has been drawn up<sup>1</sup>. The whole of the correspondence or documents must be considered; and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communication<sup>2</sup>. Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract were omitted from those letters<sup>3</sup>; and the mere fact that the parties think there is a binding contract is not conclusive<sup>4</sup>. But once there has been a definite acceptance of all the terms of an offer and the acceptance was without qualification, further negotiations between the parties cannot, without the consent of both<sup>5</sup>, get rid of the contract which has been made<sup>6</sup>.

A modern application of the above rules has involved negotiations towards large contracts where at some stage one party issues to the other a declaration that he wishes to do business. Sometimes such communications have been held to negative contractual intention, as by showing that the parties have not finished agreeing<sup>7</sup>, or do not intend contractual relations<sup>8</sup>. But where such a document does not negative contractual intention, it may form the basis of a contract<sup>9</sup>, especially in the case of large commercial transactions which have been partially executed<sup>10</sup>.

1 *Rossiter v Miller* (1878) 3 App Cas 1124 at 1152, HL, per Lord Blackburn; *Bonnewell v Jenkins* (1878) 8 ChD 70, CA; *Bolton Partners v Lambert* (1889) 41 ChD 295, CA; *Filby v Hounsell* [1896] 2 Ch 737; *Santa Fé Land Co Ltd v Forestal Land, Timber and Rly Co Ltd* (1910) 26 TLR 534; *Rossdale v Denny* [1921] 1 Ch 57, CA; *Darvell v Basildon Development Corp* (1969) 211 Estates Gazette 33. See also *Clifton v Palumbo* [1944] 2 All ER 497 at 502, CA, per Finlay LJ ('while it is possible for people to contract to sell a large property informally on a half sheet of notepaper, it is very unlikely'); *Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201, [1969] 1 WLR 1378, CA ('without prejudice' correspondence); *D'Silva v Lister House Development Ltd* [1971] Ch 17 at 29, [1970] 1 All ER 858 at 866 (letters written by solicitors in 'subject to contract' correspondence cannot be relied on as constituting a contract; but see now para 671 post); *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 (see note 7 infra). As to contracts by correspondence for the sale of an interest in land see para 637 note 9 ante.

2 *Hussey v Horne-Payne* (1879) 4 App Cas 311 at 316, HL, per Lord Cairns LC; *Bristol, Cardiff and Swansea Aerated Bread Co v Maggs* (1890) 44 ChD 616 at 626 per Kay J. See also *Watson v McAllum* (1902) 87 LT 547; *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711, [1971] 3 All ER 16, CA; *Hofflinghouse & Co Ltd v C-Trades SA, The Intra Transporter* [1986] 2 Lloyd's Rep 132, CA; *Harvey v Perry* [1953] 1 SCR 233, [1953] 2 DLR 465, Can SC; cf *Pattle v Hornibrook* [1897] 1 Ch 25.

3 *Hussey v Horne-Payne* (1879) 4 App Cas 311, HL; *May v Thomson* (1882) 20 ChD 705, CA; *Bristol, Cardiff and Swansea Aerated Bread Co v Maggs* (1890) 44 ChD 616; *Swan v Miller, Son and Torrance Ltd* [1919] 1 IR 151, CA; *Bishop and Baxter Ltd v Anglo-Eastern Trading and Industrial Co Ltd* [1944] KB 12, [1943] 2 All ER 598, CA; *J Milhem & Sons v Fuerst Bros & Co Ltd* [1954] 2 Lloyd's Rep 559. Such evidence is not, however, admissible to interpret a contract: see para 622 note 23 ante.

4 *G Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251, [1941] 1 All ER 14, HL; *Compagnie de Commerce et Commission SARL v Parkinson Stove Co Ltd* [1953] 2 Lloyd's Rep 487, CA; *Mathieson Gee (Ayrshire) Ltd v Quigley* 1952 SC 38, HL; *Kingsley and Keith Ltd v Glynn Bros (Chemicals) Ltd* [1953] 1 Lloyd's Rep 211.

5 As to variations of contract see generally para 1019 et seq post.

6 *Stratford v Bosworth* (1813) 2 Ves & B 341; *Cayley v Walpole* (1870) 39 LJ Ch 609; *Bellamy v Debenham* (1890) 45 ChD 481 (affd on another point [1891] 1 Ch 412, CA); *Perry v Suffields Ltd* [1916] 2 Ch 187, CA; *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA; *British Guiana Credit Corp v Da Silva* [1965] 1 WLR 248, PC. See also *Barry, Ostlere and Shepherd Ltd v Edinburgh Cork Importing Co Ltd* 1909 SC 1113.

7 *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 ('letter of intent': but see para 669 note 2 post).

8 *Kleinwort Benson Ltd v Malaysian Mining Corp Bhd* [1989] 1 All ER 785, [1989] 1 WLR 379, CA ('letter of comfort'); criticised in *Banque Brussels Lambert v Australian National Industries Ltd* (1989) 21 NSWLR 502, Aust; and see para 721 post.

9 See para 650 ante.

10 See paras 674-675 post.

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### 669. Provisional agreements.

Where there is an informal agreement which expressly requires or envisages the subsequent execution of a formal contract, the legal effect of that prior informal agreement at common law<sup>1</sup> depends on the intention of the parties<sup>2</sup>, as with letters of intent<sup>3</sup>. They may have entered into a binding provisional agreement, whilst envisaging its subsequent replacement by a more formal one<sup>4</sup>; or they may evince an intention only to be bound on the execution of the formal contract<sup>5</sup>, the prior informal agreement being of no legal effect<sup>6</sup>. A similar dichotomy may be observed over arrangements to sell property 'at a price to be agreed', or on similar terms: an option in such terms will usually fail for uncertainty<sup>7</sup>; but a right of pre-emption may be binding<sup>8</sup>.

Where there is a definite acceptance of an offer to enter into a provisional agreement<sup>9</sup>, the fact that it is accompanied by a statement that the acceptor desires that the arrangement should be put into a more formal shape does not relieve either party from his liability under the provisional agreement<sup>10</sup>, for instance: informal contracts for the sale of an interest in land by auction<sup>11</sup>; contracts of insurance made on the signing of the insurance slip<sup>12</sup>; contracts made on auction particulars<sup>13</sup>; an informal acceptance of a tender for a large building contract<sup>14</sup>; a rough draft of an agreement to retire from a partnership<sup>15</sup>; an outline agreement, the minor terms of which are to be filled in by a third party<sup>16</sup>; a letter of intent<sup>17</sup>; the mere performance of the terms of a formal contract without the envisaged signature<sup>18</sup>; an agreement by telephone to be confirmed by letter<sup>19</sup>; an agreement by telex of the main terms<sup>20</sup>; a collateral contract not to negotiate with a third party<sup>21</sup>.

If the envisaged formal contract does materialise, it may exactly reflect the terms of the prior provisional agreement<sup>22</sup>, in which case it may have little more than an evidential value<sup>23</sup>. Alternatively, it may differ materially from the provisional agreement, so that it may be material to decide whether it has replaced that provisional agreement<sup>24</sup>.

1 Contra regulated agreements: see the Consumer Credit Act 1974 s 59(1); and CONSUMER CREDIT para 159 ante.

2 *Rossiter v Miller* (1878) 3 App Cas 1124 at 1152, HL, per Lord Blackburn; *Branca v Cobarro* [1947] KB 854, [1947] 2 All ER 101, CA (informal agreement stated to be 'provisional until a fully legalised agreement drawn up'; agreement immediately binding); *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at 288-289 per Parker J; cf *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099, CA; *Sociedade Portuguesa de Navios Tanques Lda v Hvalfangerselskapet Polaris AS* [1952] 1 Lloyd's Rep 407, CA.

3 *Ali v Ahmed* (1996) 71 P & CR D39, CA (see also para 721 note 7 post); and see note 17 infra. See para 668 note 7 ante.

4 See eg the cases cited in notes 12-19 infra.

5 *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504; *Okura & Co Ltd v Navara Shipping Corpn SA* [1982] 2 Lloyd's Rep 537, CA.

6 See para 670 post.

7 *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426 (option to renew lease 'at such rental as may be agreed'); and see para 640 ante.

8 *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA (right of pre-emption 'at a figure to be agreed'); and see para 641 ante.

9 As to acceptance see para 650 et seq ante.

10 Though that provisional agreement may be subsequently replaced by a formal one: see the text and notes 11-24 infra.

11 This being one of the categories of contract excepted from the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see para 624 ante.

12 *Ionides v Pacific Insurance Co* (1871) LR 6 QB 674 at 684; and see INSURANCE.

13 *Cowley v Watts* (1853) 22 LJ Ch 591; *Filby v Hounsell* [1896] 2 Ch 737; and see AUCTION.

14 *Lewis v Brass* (1877) 3 QBD 667, CA; *Frank Horton & Co Inc v Cook Electric Co* 356 F 2d 484 (USA 7th Cir 1966); certificate denied 86 S Ct 1572. As to the formation of a contract by tender see para 635 ante; and see also BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 23.

15 *Gray v Smith* (1889) 43 ChD 208, CA. But see *Hurst v Bryk* [1997] 2 All ER 283, CA; and see generally PARTNERSHIP vol 79 (2008) PARA 76 et seq.

16 *Morton v Morton* [1942] 1 All ER 273 (maintenance agreement); and see the Sale of Goods Act 1979 s 8(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 56.

17 *Sturgeons Ltd v Municipality of Metropolitan Toronto* [1968] 2 OR 526, 70 DLR (2d) 20 (Ont) (building sub-contract); *Frank Horton & Co Inc v Cook Electric Co* 356 F 2d 485 (USA 7th Cir 1966); certificate denied 86 S Ct 1572. However, whilst agreement may have been reached in the business sense, the danger is that there may be no intention to create legal relations until the formal contract is signed: *Telephone Rentals v Museum Estates* (1948) 151 Estates Gazette 178 (lease). As to the intention to create legal relations see further para 718 et seq post.

18 *Brogden v Metropolitan Rly Co* (1877) 2 App Cas 666, HL. As to alternative modes of acceptance see generally para 658 ante.

19 *Pelzman v Israel & Sons* 306 NY 254, 117 NE 2d 352 (USA 1954) (confirmatory letters, which crossed in the post, evidence of prior oral contract, despite their variance from each other in two respects).

20 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, CA (sale of corn pellets). But see *Okura & Co Ltd v Navara Shipping Corp SA* [1982] 2 Lloyd's Rep 537, CA (construction and sale of ship. Held: no contract: see note 5 supra).

21 *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961, [1994] 1 WLR 327, CA. As to 'lock-out agreements' see para 641 ante; as to statutory requirements see para 624 ante; and as to consideration see para 731 post.

22 Of course, it may be a much fuller contract in that it sets out terms which the provisional agreement merely incorporated by reference (as to which see para 688 post), or left to be fixed by a third party (see note 16 supra).

23 In many large commercial contracts, the formal contract may not be signed until the contract is substantially, or even completely, performed: see eg *Trollope & Colls Ltd v Atomic Power Constructors Ltd* [1962] 3 All ER 1035, [1963] 1 WLR 333. As to the position where the envisaged formal contract is never signed at all see para 675 post.

24 See eg *Trollope & Colls Ltd v Atomic Power Constructors Ltd* [1962] 3 All ER 1035, [1963] 1 WLR 333; *Hurst v Bryk* [1997] 2 All ER 283, CA. As to implied acceptance in such circumstances see para 654 notes 21-23 ante; and as to variation of contracts see generally para 1019 et seq post. If there is no such variation, the formal agreement may be rectified; as to rectification see para 690-700 post.

## UPDATE

### 669-670 Provisional agreements, Conditional agreement

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

## 669 Provisional agreements

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTES 15, 24--*Hurst v Bryk*, cited, affirmed: [2000] 2 WLR 740, HL.

NOTE 20--*Pagnan SpA v Feed Products Ltd*, cited, applied in *Manatee Towing Co v Oceanbulk Maritime SA*; *Oceanbulk Maritime SA v Manatee Towing Co*; *Manatee Towing Co v McQuilling Brokerage Partners Inc* [1999] 2 All ER (Comm) 306 (final agreement not capable of giving rise to binding contract); and approved in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753, [2010] All ER (D) 95 (Mar) (letter of intent prior to formal contract where contract never signed).



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### **670. Conditional agreement.**

Leaving aside conditional gifts<sup>1</sup>, a distinction must first be drawn between a conditional acceptance and a conditional agreement. A conditional acceptance can never conclude a binding contract<sup>2</sup>; but whether a conditional agreement will do so depends on whether the condition is precedent to contract or merely to performance<sup>3</sup>.

Whether a condition is precedent to contract or to performance is essentially a question of whether the parties have or have not completed the process of reaching agreement<sup>4</sup>. Thus, the fact that the parties contemplate the execution of a formal contract is some evidence that they do not intend to be bound until it is signed<sup>5</sup>; but there is nothing to prevent them indicating that they intend to enter into a binding provisional agreement<sup>6</sup>. Similarly, it is not necessarily conclusive that the parties expressly make their agreement subject to contract, or to a certain condition, or to a certain matter being satisfactory, for the same words may signify a different intention in different circumstances<sup>7</sup>.

It has been held that a condition was precedent to contract, so that there was no contract at all until the condition was fulfilled, in the following cases<sup>8</sup>: an agreement made subject to contract<sup>9</sup>; the payment of a deposit<sup>10</sup>; planning consent<sup>11</sup>; a surveyor's report<sup>12</sup>; inquiries<sup>13</sup>; running or marketing trials<sup>14</sup>; mortgage finance<sup>15</sup>; confirmation<sup>16</sup>; ratification<sup>17</sup>; the approval of a third party<sup>18</sup>, or the exercise of an option<sup>19</sup>, or some other event<sup>20</sup>. Where a condition is for the benefit of both parties, it cannot be waived by one of them so as to create a binding contract<sup>21</sup>. It has been said, however, that such a condition can be waived by one party where it is for his benefit alone<sup>22</sup>; but it is difficult to see the basis on which this argument rests<sup>23</sup>.

On the other hand, it has been held that the condition was only precedent to any performance and there was a binding contract immediately in the following cases: an agreement which is made subject to conditions that would in any event be implied by law<sup>24</sup>; or is made subject to mortgage finance<sup>25</sup>, to planning approval<sup>26</sup>, to a valuation<sup>27</sup>, to satisfactory references<sup>28</sup>, to the granting of a necessary export or import licence<sup>29</sup>, to a third party report<sup>30</sup>, to the consent of a third party<sup>31</sup>, to the approval of the court<sup>32</sup> or a third party<sup>33</sup>, or to the opening of a letter of credit<sup>34</sup>, to the availability of shipping<sup>35</sup>, or to survey<sup>36</sup>; or an offer of employment made subject to satisfactory references<sup>37</sup>. Until the condition materialises, such a contract is not to be performed<sup>38</sup>; and, if the condition does not materialise by a certain date, the contract is off<sup>39</sup>. Usually such conditions will be construed to mean that both parties have impliedly promised not to prevent the condition from materialising<sup>40</sup>; and it may be that one party has promised to use his best endeavours to secure that it does materialise<sup>41</sup>. Where the condition fails to materialise without fault on the part of either party, both may be discharged<sup>42</sup>; but if the condition is for the benefit of one party alone, it may be waived by that party<sup>43</sup>.

1 *Dickinson v Abel* [1969] 1 All ER 484, [1969] 1 WLR 295; *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793, CA, Scrutton LJ dissenting. Another way of looking at such situations is to say that there is no intention to create legal relations: see para 718 et seq post.

2 As to conditional acceptances see para 661 ante; and as to joint promises see para 662 ante.

3 For an explanation of this distinction see generally para 962 post. For the special case of a take-over bid, where the offeree may be bound even though the offeror is not bound until a condition is fulfilled, see COMPANIES vol 15 (2009) PARA 1511.

4 See para 667 ante.

5 *Winn v Bull* (1877) 7 ChD 29; *Hawkesworth v Chaffey* (1886) 55 LJ Ch 335; *Watson v McAllum* (1902) 87 LT 547; *Lloyd v Nowell* [1895] 2 Ch 744; *Bromet v Neville* (1909) 53 Sol Jo 321; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284; *Rossdale v Denny* [1921] 1 Ch 57, CA: see *Honeyman v Marryatt* (1857) 6 HL Cas 112 at 113; *Chinnock v Marchioness of Ely* (1865) 4 De GJ & Sm 638 at 646 per Lord Westbury; *Green v Ainsmore Consolidated Mines Ltd* [1951] 3 DLR 632 (BC); *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385, NZ CA. *North v Percival* [1898] 2 Ch 128, may be taken to be overruled (*Rossdale v Denny* supra at 67). See also the cases cited in note 11 infra.

6 *Ridgway v Wharton* (1856) 6 HL Cas 238 at 268 per Lord Cranworth LC. See eg *Smith and Olley v Townsend* (1949) 1 P & CR 28 (contract for sale of property 'subject to inquiries'). As to provisional agreements see generally para 669 ante.

7 As to agreements subject (1) to contract, see note 9 infra; (2) to a condition, see notes 15, 25 infra; (3) to a certain matter being satisfactory, see notes 18, 33 infra.

8 Whilst the cases cited in notes 9-20 infra quite clearly say that the condition was precedent to contract, it has been argued that in all cases the condition was only precedent to performance, and the distinction was not material to the cases. However, in *Law v Jones* [1974] Ch 112, [1973] 2 All ER 437, CA, Buckley LJ said (at 443) that the use of the expression 'subject to contract' (as to which see note 9 infra) 'indicates that the parties do not intend to be immediately bound, or, to put it into Latin, that they have no present *animus contrahendi*'. As to intention to create legal relations see para 718 post.

9 *John Howard & Co (Northern) Ltd v JP Knight Ltd* [1969] 1 Lloyd's Rep 364 (sale of ship 'subject to contract'; and 'subject to satisfactory running trials', as to which see note 14 infra); *Horrobin v Majestic Hotel (Cheltenham) Ltd* (1973) 227 Estates Gazette 993 (sale of shares); *Bunker-Smith v Freeza Meats Ltd* [1987] BTL 20, CA (sale of goods); *Ronald Preston & Partners v Markheath Securities plc* [1988] 2 EGLR 23 (promise to pay estate agent's fee). As to sales of an interest in land 'subject to contract' see now para 671 post.

10 *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, [1974] 1 WLR 331.

11 *Tesco Stores Ltd v William Gibson & Son Ltd* (1970) 214 Estates Gazette 835, CA; *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148; *Barnett v Harrison* [1973] 2 OR 176, Ont CA. But compare the cases cited in note 41 infra.

12 *Marks v Board* (1930) 46 TLR 424; *Astra Trust Ltd v Adams and Williams* [1969] 1 Lloyd's Rep 81; *Goodey and Southwold Trawlers Ltd v Garriock, Mason and Millgate* [1972] 2 Lloyd's Rep 369.

13 *Smith and Olley v Townsend* (1949) 1 P & CR 28 ('subject to answers to preliminary inquiries and subject to searches').

14 *John Howard & Co (Northern) Ltd v JP Knight Ltd* [1969] 1 Lloyd's Rep 364 (running trials; for another point see note 9 supra); *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385, NZ CA (marketing trials).

15 *Lee-Parker v Izzet (No 2)* [1972] 2 All ER 800, [1972] 1 WLR 775 (and see para 672 note 26 post); *Scott v Rania* [1966] NZLR 527, NZ CA. But compare the cases cited in note 25 infra; and *Graham v Pitkin* [1992] 2 All ER 235 at 237, [1992] 1 WLR 403 at 406, PC, per Lord Templeman: 'But since the purchaser, if he had the money, could always declare that a mortgage of £10 from his brother-in-law was 'satisfactory', their Lordships doubt the finding that there was no contract'.

16 *EM Denny & Co Ltd v Wholesalers (Australia) Pty Ltd* [1959] 1 Lloyd's Rep 167.

17 *Warehousing and Forwarding Co of East Africa Ltd v Jafferali & Sons Ltd* [1964] AC 1, [1963] 3 All ER 571, PC. The situation where an agent expressly purports to contract subject to ratification by his principal must be distinguished from that where an agent incorrectly purports to have authority but his act is subsequently ratified by the principal. The latter situation is discussed in AGENCY vol 1 (2008) PARA 57 et seq.

18 *Pym v Campbell* (1856) 6 E & B 370 (sale of an invention subject to A's approval); *Chatterley v Nicholls* (1884) 1 TLR 14, CA (subject to approval of the terms of the contract); *Lockett v Norman-Wright* [1925] Ch 56 (subject to suitable agreements being arranged between solicitors); and see *Harvey v Principal and Ancients of Barnard's Inn* (1881) 50 LJ Ch 750; *Vale of Neath Colliery Co v Furness* (1876) 45 LJ Ch 276; *Page v Norfolk* (1894) 70 LT 781, CA; *Bain v Schlecht* [1949] QSR 1 (Qld). But compare the cases cited in note 33 infra.

19 See para 640 ante.

20 See eg *Aitchison-Tait v Bennett* (1973) 229 Estates Gazette 1733 (contracts exchanged subject to preparation of inventory); *Strand v Corlett* [1950] 2 WWR 1236, [1951] 1 DLR 307, Sask CA (executrix

'accepted' offer, but said she 'will not be able to negotiate the deal until such time after my father's will has been probated').

21 *Lloyd v Nowell* [1895] 2 Ch 744.

22 *Scott v Rania* [1966] NZLR 527, NZ CA. Cf note 39 *infra*.

23 Thus a vendor cannot, by waiving reservations in his own favour, successfully set up an enforceable contract if this had never been contemplated by the parties: *Allsopp v Orchard* [1923] 1 Ch 323. Basically, the parties in this situation have not finished agreeing; as to which see para 667 *ante*.

24 *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30, CA (lease to contain covenants reasonably required. Held: not too vague: see further para 674 note 18 *post*). Similarly, the approval of the vendor's title: see *Gordon v Mahony* (1850) 13 I Eq R 383 at 404; *Chatterley v Nicholls* (1884) 1 TLR 14, CA. But if the condition is 'subject to our solicitor's approval of the title', this imports an addition to the obligation to make a good title implied by law: *Hussey v Horne-Payne* (1878) 8 ChD 670 at 678, CA (*affd* (1879) 4 App Cas 311, HL); *Curtis Moffat Ltd v Wheeler* [1929] 2 Ch 224, where Maugham J preferred this view of the Court of Appeal to the contrary opinion of Lord Cairns in *Hussey v Horne-Payne* (1879) 4 App Cas 311 at 322, HL, which he treated as *obiter*. Similarly, where an agreement for sale of a lease is 'subject to the purchaser's solicitor approving the lease' the contract is conditional: *Caney v Leith* [1937] 2 All ER 532, applying *Hudson v Buck* (1877) 7 ChD 683; *Clack v Wood* (1882) 9 QBD 276; *Curtis Moffat Ltd v Wheeler* *supra*. It appears, however, that, in the case of an agreement to grant a lease, a provision for approval by a party's solicitor may be construed as being merely a safeguard to ensure that the lease embodies the terms of the agreement and does not contain any unusual stipulations: *Chipperfield v Carter* (1895) 72 LT 487, explained in *Caney v Leith* *supra* at 535: see also *Eadie v Addison* (1882) 52 LJ Ch 80; *Varverakis v Compagnia de Navegacion Artico SA, The Merak* [1976] 2 Lloyd's Rep 250, CA.

25 *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; *Janmohamed v Hassam* [1977] 1 EGLR 142. See also *Barber v Crickett* [1958] NZLR 1057; *McKenzie v Hiscock* (1965) 54 WWR 163, 55 DLR (2d) 155, Sask CA, especially at 176 and 163 per Brownridge JA; *Meehan v Jones* (1981) 42 ALR 463, Aust HC. But compare the cases cited in note 15 *supra*.

26 *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA; *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 (see para 644 note 10 *ante*); *Batten v White* (1960) 12 P & CR 66; *NW Investments (Erdington) Ltd v Swani* (1970) 214 Estates Gazette 1115; *Selfratex v Shavelson* (1973) 230 Estates Gazette 108. See also *Caldwell v Canadian Petrofina Ltd* (1958) 14 DLR (2d) 208 (NS); *Fabbi v Jones* (1972) 28 DLR (3d) 224, Can SC; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, Aust HC; *Gordon District Council v Wimpey Homes Holdings Ltd* 1988 SLT 481.

27 *Talbot v Talbot* [1968] Ch 1, [1967] 2 All ER 920, CA (land); *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA (land); *Baber v Kenwood Manufacturing Co* [1978] 1 Lloyd's Rep 175, CA (shares); *Harcourt v Craddock* [1954] OR 308, [1954] 3 DLR 155, Ont CA.

28 *Hinderer v Weir* (1952) 160 Estates Gazette 4; *affd* (1953) 161 Estates Gazette 156, CA.

29 See para 908 *post*.

30 *Susands and Coates v Park Motors (Kingston) Ltd* (1954) 104 L Jo 412, county court (RAC report).

31 See the cases on repairing covenants subject to building licences cited in para 908 *post*.

32 *Smallman v Smallman* [1972] Fam 25, [1971] 3 All ER 717, CA.

33 *Marten v Whale* [1917] 2 KB 480, CA (sale of land subject to purchaser's solicitors' approval of title); *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241 (sale of land subject to the approval of the Secretary of State); *Michael Richards Properties Ltd v Corporation and Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416 (sale of land subject to the approval of the Charities Commissioners); *Property Discount Corp Ltd v Lyon Group Ltd* [1980] 1 All ER 334 (building plans to be approved by the surveyor of one party, *affd* on other grounds [1981] 1 All ER 379, CA); *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525, [1982] 1 WLR 1109 (sale of land subject to the approval of the Charities Commissioners). See also *100 Main St v WB Sullivan Construction Ltd* (1978) 20 OR (2d) 401, Ont CA (sale of land subject to consent of the mortgagees). But compare the cases cited in note 18 *supra*. See further para 964 *post*.

34 *Loutfi v Czarnikow Ltd* [1953] 2 Lloyd's Rep 213, CA. See further paras 951, 962 *post*.

35 *Brown & Gracie Ltd v FW Green & Co Pty Ltd* [1960] 1 Lloyd's Rep 289, HL (failure by plaintiffs to obtain a report from the Royal Automobile Club on the mechanical condition of a vehicle which they had contracted to purchase subject to satisfactory report to be obtained by them).

36 *Ee v Kakar* (1979) 40 P & CR 223 (sale of land); *Biring v Lightning Windows* [1986] CLY 387, county court (double glazing).

37 *Wishart v National Association of Citizens Advice Bureaux Ltd* [1990] ICR 794, CA.

38 *Eyre Construction Ltd v Scott* (1973) 229 Estates Gazette 259 ('six months notice'); *Savid Developments Ltd v Gibbs* [1975] 2 EGLR 11 (subject to disapproval of wife or solicitor); *Cutts v Heron Garage* (1974) 232 Estates Gazette 459 (subject to satisfactory planning inquiries); *Beech Properties v GE Wallis & Sons* [1976] JPL 429 (subject to sewer access to a 'public outlet'); *Gyllenhammar & Partners International Ltd v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep 403; *London & Clydesbank Properties Ltd v HM Investment Co Ltd* [1993] EGCS 63 (subject to grant of planning permission within a certain time). If the condition is for the benefit of both parties, it cannot be waived by one of them: *Federated Homes Ltd v Turner* [1975] 1 EGLR 147 (buyer could not waive condition). But see note 43 infra.

39 As to conditions subsequent see para 962 post.

40 See paras 899, 969 post.

41 *NW Investments (Erdington) Ltd v Swani* (1970) 214 Estates Gazette 1115; *Hinderer v Weir* (1952) 160 Estates Gazette 4 (affd (1953) 161 Estates Gazette 156, CA); *Harcourt v Craddock* [1954] OR 308, [1954] 3 DLR 155, Ont CA. See also the Sale of Goods Act 1979 s 9(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 61. But compare the cases cited in note 11 supra.

42 *Francis H Newman (Shipyards) Ltd v Watts* [1958] 2 Lloyd's Rep 313; *Barber v Crickett* [1958] NZLR 1057. See further para 897 et seq post (the doctrine of frustration).

43 *Hawkesley v Outram* [1892] 3 Ch 359, CA; *Morrell v Studd and Millington* [1913] 2 Ch 648; *Batten v White* (1960) 12 P & CR 66; *Wood Preservation Ltd v Prior*, (Inspector of Taxes) [1969] 1 All ER 364, [1969] 1 WLR 1077, CA; *Usanga v Bishop* (1974) 232 Estates Gazette 835. Cf *Société Capa Srl Ltd v Acatos & Co Ltd* [1953] 2 Lloyd's Rep 185; see also *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148. Cf note 38 supra. As to waiver see generally para 1025 et seq post; and as to waiver of a stipulated mode of acceptance see para 654 note 13 ante.

## UPDATE

### 669-670 Provisional agreements, Conditional agreement

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 670 Conditional agreement

NOTE 8--See also *Eurodata Systems plc v Michael Gershon (Finance) plc* (2003) Times, 25 March (precondition to contract as to execution of lease agreements).

NOTE 9--See also *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 (Ch), [2003] EMLR 790 (music licensing agreement 'subject to contract').

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iv) Incomplete Agreements/671. Sales of land 'subject to contract'.

### **671. Sales of land 'subject to contract'.**

In contracts for the sale of an interest in land<sup>1</sup>, apart from contracts made by auction<sup>2</sup>, it is the almost invariable practice for the parties to strike a bargain but to make it clear that they do not intend to enter into a binding contract until a formal agreement has been drawn up by their solicitors and contracts have been 'exchanged'<sup>3</sup>. Such an intention is commonly indicated by the parties expressly making their agreement 'subject to contract'<sup>4</sup>, although it is thought that, with respect to bargains concluded on or after 27 September 1989<sup>5</sup>, this form of wording is no longer required in most cases<sup>6</sup>.

The sale of land is discussed in detail elsewhere in this work<sup>7</sup>.

1 See generally para 637 ante.

2 Agreements for the sale of land by auction are not usually made 'subject to contract': see para 669 ante. Such agreements are excepted from the formalities required by the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see para 624 ante.

3 This is only a matter of intention, and it is quite competent for them to enter into a binding provisional agreement: *Branca v Cobarro* [1947] KB 854, [1947] 2 All ER 101, CA ('This is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated is signed'); *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, [1978] 2 All ER 557, CA (held that the parties had made an oral unilateral contract for the sale of land (see para 657 ante); but the contract was unenforceable under the Statute of Frauds (1677), and would now be unenforceable under the Law of Property (Miscellaneous Provisions) Act 1989 (see para 624 ante)). See also *Horrobin v Majestic Hotel (Cheltenham) Ltd* (1973) 227 Estates Gazette 993; *Gibson v Manchester City Council* [1979] 1 All ER 972, [1979] 1 WLR 294, HL. As to exchange of contracts see para 624 note 6 ante; and see generally SALE OF LAND.

4 *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146 at 169, [1974] 1 All ER 209 at 225, CA, per Stamp LJ; *Eccles v Bryant* [1948] Ch 93, [1947] 2 All ER 865, CA; *Botley v Vidal* (1905) 49 Sol Jo 634; *Coope v Ridout* [1921] 1 Ch 291, CA; *Wilson v Balfour* (1929) 45 TLR 625; *Raymond v Wooten* (1931) 47 TLR 606, DC; *D'Silva v Lister House Development Ltd* [1971] Ch 17, [1970] 1 All ER 858; *Thompson & Son Ltd v R* [1920] 2 IR 365 (affd [1921] 2 IR 438, CA); *Munton v Greater London Council* [1976] 2 All ER 815, [1976] 1 WLR 649, CA (compulsory purchase order); *Longman v Viscount Chelsea* (1989) 58 P & CR 189, CA; and see further SALE OF LAND. Cf *Keppel v Wheeler* [1927] 1 KB 577, CA; and see further AGENCY vol 1 (2008) PARA 81.

5 Ie the commencement date of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see s 5(3), (4).

6 See para 624 ante, especially at note 6.

7 See further SALE OF LAND.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iv) Incomplete Agreements/672. The requirement of certainty.

### **672. The requirement of certainty.**

The general rule is that, if the terms of an agreement are so vague or indefinite that it cannot be ascertained with reasonable certainty what is the intention of the parties, there is no contract enforceable at law. It has been said that there are two main ways in which this may happen: a clause may be devoid of any meaning or have such a wide variety of meanings that it is impossible to say which of them is intended<sup>1</sup>.

The following are examples of such terms: an undertaking to retire from a business 'so far as the law allows'<sup>2</sup>, or on its sale to leave a large proportion of the price in it<sup>3</sup>; a promise that, if satisfied with the plaintiff as a customer, the defendant would favourably consider an application by him to renew a subsidiary contract<sup>4</sup>; an agreement that the plaintiff employee should receive a reasonable share of his employer's profits<sup>5</sup>, or that an employee should receive 'permanent employment'<sup>6</sup>; a lease which fails to specify the date of commencement<sup>7</sup>, or contains an unintelligible proviso<sup>8</sup>; a sale of goods which is made subject to a 'war clause'<sup>9</sup>, 'force majeure conditions'<sup>10</sup>, a 'strike and lock-out clause'<sup>11</sup>, or whose price might be enhanced if the goods sold were 'lucky'<sup>12</sup>; a contract for the sale of land reserving 'necessary land for making a railway'<sup>13</sup>; or whereby in a loan agreement the interest rate is subject to 'a due allowance' if the profits of the borrower are deficient<sup>14</sup>; an agreement 'to provide for' a relation<sup>15</sup>; an agreement 'to develop' a mining property<sup>16</sup>; a contract of option<sup>17</sup> which leaves uncertain the identity of the option-holder, the subject matter and the terms on which the option may be exercised<sup>18</sup>, or to give an option to extend an agreement 'on terms to be agreed'<sup>19</sup>; an agreement to sell goods 'on hire-purchase terms'<sup>20</sup>; a contract to employ a person simply as a 'director'<sup>21</sup> or 'consultant'<sup>22</sup>; an estate agent's contract whereunder it was wholly uncertain on what event the agent was to be entitled to his commission<sup>23</sup>; a printed form of contract which provides for a number of alternatives and envisages the deletion of all but one of these, but where there is no such deletion<sup>24</sup>; an agreement to sell land 'subject to answers to preliminary inquiries and subject to searches'<sup>25</sup>, or subject to the purchaser obtaining 'a satisfactory mortgage'<sup>26</sup>; an agreement to employ a building contractor at a price to be agreed<sup>27</sup>; or an agreement to sell land with the price payable by instalments and a 'proportionate' part of the land released on each payment<sup>28</sup>.

The courts, however, do not expect commercial documents to be drafted with strict precision<sup>29</sup>; the court will look at the document as a whole<sup>30</sup> and it has been said that, in construing an agreement, a court should not hold a provision to be void for uncertainty unless it cannot resolve the ambiguity which it is said to contain<sup>31</sup>. Thus, provided the terms amount to a concluded agreement<sup>32</sup>, it may be possible to resolve the ambiguity or other uncertainty with the aid of parol evidence<sup>33</sup>, or by reference to the subsequent conduct of the parties<sup>34</sup>; or to ignore the uncertain phrase altogether on the grounds that it is totally meaningless<sup>35</sup>. Finally, it should be remembered that the degree of uncertainty in an agreement is a factor which may go to the question of whether or not the parties intend to create legal relations<sup>36</sup>.

1 *Brown v Gould* [1972] Ch 53 at 61, [1971] 2 All ER 1505 at 1512.

2 *Davies v Davies* (1887) 36 ChD 359, CA.

3 *Cooper v Hood* (1858) 28 LJ Ch 212.

4 *Montreal Gas Co v Vasey* [1900] AC 595, PC.

- 5 *Way v Latilla* [1937] 3 All ER 759, HL. See also *Taylor v Brewer* (1813) 1 M & S 290; *Roberts v Smith* (1859) 28 LJ Ex 164.
- 6 *Cook v Grubb* 1961 SLT 405.
- 7 *Harvey v Pratt* [1965] 2 All ER 786, [1965] 1 WLR 1025, CA (see para 789 note 22 post); *Re Day's Will Trusts, Lloyds Bank Ltd v Shafe* [1962] 3 All ER 699, [1962] 1 WLR 1419. See also *Jones v Padavatton* [1969] 2 All ER 616, [1969] 1 WLR 328, CA. As to uncertainty in relation to leases see generally LANDLORD AND TENANT.
- 8 *Mundy v Duke of Rutland* (1883) 23 ChD 81, CA. See also *Taylor v Portington* (1855) 7 De GM & G 328 (agreement to take lease of rooms 'handsomely decorated in present style').
- 9 *Bishop and Baxter Ltd v Anglo-Eastern Trading and Industrial Co Ltd* [1944] KB 12, [1943] 2 All ER 598, CA.
- 10 *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 All ER 94, [1953] 1 WLR 280 (because it might refer to one of a number of such conditions. Contra if the agreement had merely said 'subject to force majeure': see para 906 post.).
- 11 *Love and Stewart Ltd v S Instone & Co Ltd* (1917) 33 TLR 475, HL. There is a similar approach to 'lock-out agreements' on the sale of property: see para 641 note 17 ante.
- 12 *Guthing v Lynn* (1831) 2 B & Ad 232.
- 13 *Pearce v Watts* (1875) LR 20 Eq 492.
- 14 *Re Vince, ex p Baxter* [1892] 2 QB 478, CA.
- 15 *Richardson v Garnett* (1895) 12 TLR 127, CA. Cf *Levenstein v Levenstein* 1955(3) SA 615 (SA).
- 16 *Douglas v Baynes* [1908] AC 477, PC. See also *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520, PC (agreement to grant a mining lease).
- 17 See para 640 ante.
- 18 *County Hotel and Wine Co Ltd v London and North Western Rly Co* [1918] 2 KB 251. See also *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426; *Ryan v Thomas* (1911) 55 Sol Jo 364. But compare the cases on resolving ambiguity (see note 31 infra) and failed contractual price mechanisms (see para 675 note 17 post).
- 19 *British Homophone Co Ltd v Kunz and Crystallite Gramophone Record Manufacturing Co Ltd* (1935) 152 LT 589.
- 20 *G Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251, [1941] 1 All ER 14, HL. See also *Cedar Trading Co Ltd v Transworld Oil Ltd, The Gudermes* [1985] 2 Lloyd's Rep 623; *Diamond Development Ltd v Crown Assets Disposal Corp* [1972] 4 WWR 731, 28 DLR (3d) 207 (BC) (the financial arrangements in an advertisement and the resultant bid did not constitute an agreement as to the terms of payment). But see *EJ Masters Ltd v Triad Investment Co Ltd* (1962) 106 Sol Jo 450, CA; *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA; *Barker v Shakespeare* (1956) 2 DLR (2d) 768 (BC county court).
- 21 *James v Thomas Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099, CA (and see para 667 note 8 ante).
- 22 *Pocock v ADAC Ltd* [1952] 1 All ER 294n.
- 23 *Jaques v Lloyd D George & Partners Ltd* [1968] 2 All ER 187, [1968] 1 WLR 625, CA. As to agents' commission see generally AGENCY vol 1 (2008) PARA 101 et seq.
- 24 *Byrnelea Property Investments Ltd v Ramsay* [1969] 2 QB 253, [1969] 2 All ER 311, CA (a case on the Leasehold Reform Act 1967).
- 25 *Smith and Olley v Townsend* (1949) 1 P & CR 28.
- 26 *Lee-Parker v Izzet (No 2)* [1972] 2 All ER 800, [1972] 1 WLR 775 (see para 670 note 15 ante).
- 27 *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297, CA.
- 28 *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 2 All ER 283, [1976] 1 WLR 591, CA.

29 *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173, [1967] 3 All ER 301 (agreement for arbitration 'by commercial men and not lawyers' held valid); *Little v Courage Ltd* (1995) 70 P & CR 469, CA (renewal of lease; provision that tenant agree a business plan. Read as 'if so required').

30 *Coles v Hulme* (1828) 8 B & C 568 (bond described penalty as '7700', but it was clear from other parts of the documents that '£7700' was meant).

31 *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 at 663, [1960] 3 All ER 503 at 508, HL, per Lord Cohen; *Schijveshuurder v Canon (Export) Ltd* [1952] 2 Lloyd's Rep 196 at 208 per Sellers J; and the dictum cited in para 674 note 3 post. See also eg *Smith v Morgan* [1971] 2 All ER 1500, [1971] 1 WLR 803; *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505 (as to contracts of first refusal and option see generally paras 641, 640 respectively ante); *Hammond v VAM Ltd* [1972] 2 NSWLR 16 at 18, NSW CA, per Sugerman P.

32 *Kingsley and Keith v Glynn Bros (Chemicals)* [1953] 1 Lloyd's Rep 211 (as to the 'battle of the forms' see para 664 ante); *Scancarriers A/S v Aotearoa International Ltd, The Barranduna and The Tarago* [1985] 2 Lloyd's Rep 419, PC (shipowner's telex only a quotation of a freight rate: as to quotations see para 634 ante).

33 See para 690-700 post.

34 See para 674 post.

35 See para 673 post.

36 *Gould v Gould* [1970] 1 QB 275, [1969] 3 All ER 728, CA; *Jones v Padavatton* [1969] 2 All ER 616, [1969] 1 WLR 328, CA. As to the intention to create legal relations see para 718 et seq post.

## UPDATE

### 672 The requirement of certainty

NOTE 31--See also *Scammell v Dicker* [2005] EWCA Civ 405, [2005] 3 All ER 838 (contract of compromised confirmed by consent order; mere difficulties in construing terms of contract did not make it void for uncertainty).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iv) Incomplete Agreements/673. Meaningless phrases.

### 673. Meaningless phrases.

Where there is agreement on all substantial terms<sup>1</sup>, the court may disregard a subsidiary term on the grounds that it is meaningless<sup>2</sup>. Thus, where in reply to an offer to buy goods the offeree accepted the order by a letter which said 'I assume that ... the usual conditions of acceptance apply', it was held that this was a good acceptance, because there were no 'usual conditions of acceptance' and therefore those words were meaningless and might be ignored<sup>3</sup>; and, where all the terms of a contract had been set out so that there was no necessity for a further formal contract, the words 'subject to contract', included by mistake, in a letter of acceptance were ignored as meaningless<sup>4</sup>. Similarly, where a long arbitration clause contradicted itself by providing for arbitration in two different places, it was held that the arbitration clause was meaningless and might be ignored<sup>5</sup>.

However, this rule is subject to a number of limitations. First, it cannot be applied to a major term<sup>6</sup>; for instance, an agreement to buy goods 'on hire-purchase terms'<sup>7</sup>; or subject to a 'war clause' or to 'force majeure conditions'<sup>8</sup>; or an option 'on terms to be agreed'<sup>9</sup>. Secondly, the mere fact that a minor term is ambiguous does not necessarily bring it within the rule<sup>10</sup>; in such a case, the agreement containing it may still fail for incompleteness<sup>11</sup>; or alternatively, the ambiguity may be resolved from within the four corners of the agreement<sup>12</sup>, or by reference to parol evidence<sup>13</sup>, or to the subsequent conduct of the parties<sup>14</sup>.

1 However, a court ought only to treat a clause as meaningless if it was impossible to make sense of it: *Tropwood AG of Zug v Jade Enterprises, The Tropwind* [1982] 1 Lloyd's Rep 232, CA (court managed to make sense of second sentence of clause 56; as to the effect of this clause see para 675 note 6 post); *Superior Overseas Development Corpn And Phillips Petroleum (UK) Co Ltd v British Gas Corpn* [1982] 1 Lloyd's Rep 262, CA (see para 675 note 6 post).

2 *Nicolene Ltd v Simmonds* [1953] 1 QB 543, [1953] 1 All ER 822, CA. 'It would be strange indeed if a party could escape from every one of his obligations by inserting a meaningless exception from some of them ... You would find defaulters all scanning their contracts to find some meaningless clause on which to ride free': *Nicolene Ltd v Simmonds* supra at 551-552 and at 824-825 per Denning LJ. There will be no counter-offer in law merely 'because some meaningless words are used in a letter which contains an unqualified acceptance ...': *Nicolene Ltd v Simmonds* supra at 553 and at 826 per Hodson LJ.

3 *Nicolene Ltd v Simmonds* [1953] 1 QB 543, [1953] 1 All ER 822, CA. See also *Hart v Hart* (1881) 18 ChD 670; *J Gordon Alison & Co Ltd v Wallsend Slipway and Engineering Co Ltd* (1927) 43 TLR 323, CA; *Parento and Parento v Jacobsen* [1955] 2 DLR 510 (BC).

4 *Michael Richards Properties Ltd v Corpn of Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416; and see para 671 ante.

5 *EJR Lovelock Ltd v Exportles* [1968] 1 Lloyd's Rep 163, CA (first part of clause made provision for 'any dispute' to be arbitrated in London, but the second part provided that 'any other dispute' be arbitrated in Moscow). But see *Re Korda* (1957) Times, 23 November (where a provision for net income to be determined 'under the laws of the United States of America and/or Great Britain' was held to be valid; affd [1958] CLY 1029, CA).

6 See eg *Kingsley and Keith Ltd v Glynn Bros (Chemicals) Ltd* [1953] 1 Lloyd's Rep 211. Whilst there is no authority on the point, it seems likely that a 'major' term in this context is one concerned with the substantial obligations of the parties, whereas 'subsidiary' terms are only concerned with regulating the manner in which those obligations are performed.

7 See para 672 note 20 ante.

8 See para 672 notes 9-10 ante.

- 9 See para 672 note 19 ante.
- 10 *Heisler v Anglo-Dal Ltd* as reported in [1954] 1 WLR 1273 at 1277, CA, obiter per Somervell LJ.
- 11 See para 667 ante.
- 12 See eg *Brown & Gracie Ltd v FW Green & Co Pty Ltd* [1960] 1 Lloyd's Rep 289, HL; *Hobbs Padgett & Co (Reinsurance) Ltd v JC Kirkland Ltd* (1969) 113 Sol Jo 832, CA; and see further para 667 ante.
- 13 See para 690-700 post.
- 14 See para 674 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iv) Incomplete Agreements/674. Commercial agreements.

#### **674. Commercial agreements.**

Although the courts will not make a contract for the parties where none exists<sup>1</sup>, they will seek to uphold bargains made between businessmen wherever possible, recognising that they often record the most important agreements in crude and summary fashion, and will seek to construe any documents fairly and broadly, without being too astute or subtle in finding defects<sup>2</sup>. If satisfied that there was an ascertainable and determinate intention to contract, the courts will strive to give effect to that intention, looking at the substance and not at the mere form<sup>3</sup>. For instance, the courts may be willing to give effect to an agreement which lays down criteria for determining those matters left open<sup>4</sup>; or machinery for achieving sufficient certainty<sup>5</sup>, even where that machinery fails<sup>6</sup>.

This is particularly the case where there is evidence that the parties have acted on the faith that certain agreed terms constitute a contract between them<sup>7</sup>. However, there are many examples of this benevolent approach to commercial agreements, whether executed or executory. Thus, words which are grammatically meaningless may be found to be used in a mercantile sense and construed accordingly<sup>8</sup>; the mere fact that it is difficult to interpret a commercial contract is not fatal<sup>9</sup>, nor is difficulty synonymous with ambiguity<sup>10</sup>; a contract is not necessarily ineffective simply because it is open to more than one construction if the court can ascertain the meaning intended<sup>11</sup>, as for example in the case of exemption clauses and negligence liability<sup>12</sup>, or where an agreement leaves one of the parties some latitude as to the manner of its performance<sup>13</sup>; nor will the use of such indefinite terminology as 'about' or 'approximating to' usually be fatal<sup>14</sup>; a valid contract of insurance may be made at a premium to be arranged<sup>15</sup>; and gaps in a contract may be filled by reference to the previous course of dealings between the parties<sup>16</sup>, or normal practice or trade custom<sup>17</sup>, or even by the court on the basis of what is reasonable<sup>18</sup>, as in the sale of a public house where many points, such as deposit and completion, were left open<sup>19</sup>, or if a rent review clause is *prima facie* too vague<sup>20</sup>.

Indeed, businessmen involved in complicated negotiations do not always find it easy to say when a contract has been concluded: this issue is to be determined by looking at the entire negotiations between them<sup>21</sup>; and a contract once made *prima facie* will not be destroyed by further negotiations between the parties<sup>22</sup>.

As it is basically a question of intention as to whether the parties appear to have finished agreeing<sup>23</sup>, every case must turn on its facts. So it is not surprising that there are cases where it has been found that the parties to a commercial 'agreement' have not finished reaching agreement<sup>24</sup>; or that the parties did not intend a binding contract, as with letters of comfort<sup>25</sup>. However, in such circumstances, it may be possible to sue in restitution<sup>26</sup>.

1 *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297, CA (disapproving of a dictum by Lord Wright in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 515, HL, suggesting that there could be a binding contract to negotiate); *Mallozzi v Carapelli SpA* [1976] 1 Lloyd's Rep 407, CA (sale specified delivery at an Italian port, excluding Genoa. Held: seller under no obligation to negotiate for discharge at Genoa). See also *Hillas & Co Ltd v Arcos* supra at 514, obiter per Lord Wright; *Carmel Exporters and Importers Ltd v Francis Huber (India) Ltd* [1951] 1 Lloyd's Rep 15, CA. But see the text to note 18 infra. As to the situation where the parties have not finished reaching agreement see generally para 667 ante; and as to 'lock-out' agreements see para 641 ante.

2 *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 514, HL, per Lord Wright; *Hammond v VAM Ltd* [1972] 2 NSWLR 16 at 18, NSW CA, per Sugerman P.

3 *G Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251 at 268, [1941] 1 All ER 14 at 25, HL, obiter per Lord Wright. See also *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 158, [1958] 1 All ER 725 at 734, HL, per Viscount Simonds, at 161 and 736 per Lord Morton, at 178 and 747 per Lord Keith, and at 186 and 753 per Lord Somervell; and *Snelling v John G Snelling Ltd* [1973] QB 87 at 94-95, [1972] 1 All ER 79 at 85-86 per Ormrod J; *Drake & Scull Engineering Ltd v J Jarvis & Sons plc* (1997) 13 Const LJ 263, [1997] 9 CL 145, CA.

4 *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, HL (prices could be calculated by reference to the official price list). See also *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505 (option for lease 'at a rent to be fixed having regard to market value'); *Didymi Corp v Atlantic Lines and Navigation Co Inc* [1988] 2 Lloyd's Rep 108, CA (performance indemnity in charterparty binding, even though it did not contain any machinery for quantification).

5 As where the agreement allows one party to decide particular matters: *David T Boyd & Co v Louis Louca* [1973] 1 Lloyd's Rep 209 (fob sale for delivery at a 'good Danish Port'. Held: port of shipment is at buyer's option); *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918, CA (creditor may vary interest rate); *Star Shipping AS v China National Foreign Trade Transportation Corp, The Star Texas* [1993] 2 Lloyd's Rep 445, CA (one party might choose place of arbitration). A fortiori where the agreement provides for determination of outstanding points by an arbitrator or other third party: *Arcos Ltd v Aronson* (1930) 36 Ll L Rep 108 (arbitrator); *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA (valuation by surveyor); *Baber v Kenwood Manufacturing Co* [1978] 1 Lloyd's Rep 175, CA; and see the Sale of Goods Act 1979 s 8(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 56.

6 *Sudbrook Trading Estate Ltd v Eggleston* [1983] 1 AC 444, [1982] 3 All ER 1, HL (option to purchase lease at 'such price as may be agreed upon by two valuers, one to be nominated by each party'; landlord refused to appoint a valuer. Held: agreement to sell at a reasonable price to be determined by valuers).

7 See para 675 note 6 post.

8 *Ashforth v Redford* (1873) LR 9 CP 20; *Edwards v Skyways Ltd* [1964] 1 All ER 494, [1964] 1 WLR 349; *Marquest Industries Ltd v Willows Poultry Farms Ltd* (1968) 66 WWR 477, 1 DLR (3d) 513, BC CA. See generally para 777 post.

9 See para 673 note 1 ante.

10 *G Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251 at 268, [1941] 1 All ER 14 at 25, HL, obiter per Lord Wright. See also the cases cited in para 672 note 29 ante.

11 *Wade v Robert Arthur Theatres Co Ltd* (1907) 24 TLR 77 per Parker J. See also *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL; cf *J Gordon Alison & Co Ltd v Wallsend Slipway and Engineering Co Ltd* (1927) 43 TLR 323, CA.

12 *White v John Warrick & Co Ltd* [1953] 2 All ER 1021 at 1025, [1953] 1 WLR 1285 at 1292-1293, CA: see *Canada Steamship Lines Ltd v R* [1952] AC 192, [1952] 1 All ER 305, PC; *James Archdale & Co Ltd v Conservices* [1954] 1 All ER 210, [1954] 1 WLR 459, CA. As to clauses excluding liability for negligence see para 806 post; and see generally NEGLIGENCE vol 78 (2010) PARA 74. See also BAILMENT; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 178.

13 *Thorby v Goldberg* (1964) 112 CLR 597, Aust HC. Cf *Coady Store Fixtures and Equipment Co Ltd v Tosh* [1964] 2 OR 701, 46 DLR (2d) 368 (Ont).

14 *Edwards v Skyways Ltd* [1964] 1 All ER 494, [1964] 1 WLR 349 ('approximating to'); *Three Rivers Trading Co Ltd v Gwinear and District Farmers Ltd* (1967) 111 Sol Jo 831, CA ('approx').

15 *F Glicksten & Son Ltd v State Assurance Co Ltd* (1922) 10 Ll L Rep 604; and see the Marine Insurance Act 1906 s 31(2); and INSURANCE vol 25 (2003 Reissue) para 324. As to the omission of a term to be agreed in the future see also *Rafsanjan Pistachio Producers Cooperative v Kaufmanns Ltd* [1998] 2 CL 130. Cf para 667 note 3 ante.

16 *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, HL (sale of 22,000 standards of wood over the 1930 season; buyer also to have the option to buy 100,000 standards for delivery during 1931, priced according to the 1931 official price list); *F & G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep, CA (sale to a supermarket of 30-80,000 chicks during the first year of a five year contract and thereafter at 'such other figures as may be agreed'); *Dixon v Osborne* (1983) 133 New LJ 1016 (four year contract to grade all eggs sent by D); and see the Sale of Goods Act 1979 s 8(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 56.

17 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA (parties both in same business; owner's terms a variation on the trade association terms); *Shamrock Steamship Co v Storey & Co* (1899) 81 LT 413, CA (loading contract 'on the terms of the usual colliery guarantee'). See also para 667 note 17 ante; and as to implied terms see further para 780 post.

18 *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30, CA (the lease 'shall contain such other covenants ... as shall reasonably be required by' the lessor); *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL (see note 6 supra); and see para 787 post. It is, of course, difficult to draw the line between this proposition and that cited in the text to note 3 supra.

19 *Perry v Suffolk Ltd* [1916] 2 Ch 187, CA. See also *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, CA (There was said to be 'agreement on the cardinal terms of the deal: product, price, quantity, period of shipment, range of loading ports and governing contract terms' (at 611 per Bingham J)). Held: binding contract, even though parties not yet in agreement on other points, eg loading port).

20 See para 675 post.

21 See para 668 note 2 ante.

22 See para 668 note 6 ante. So, the fact that one party has a secret reservation does not prevent agreement: *Kennedy v Lee* (1817) 3 Mer 441.

23 See para 667 ante.

24 See eg *May and Butcher Ltd v R* (1929) [1934] 2 KB 17n, HL; *G Scammell and Nephew Ltd v HC and JG Ouston* [1941] AC 251, [1941] 1 All ER 14, HL; *D'Silva v Lister House Development Ltd* [1971] Ch 17, [1970] 1 All ER 858; *Diamond Developments Ltd v Crown Assets Disposal Corp* [1972] 4 WWR 731, 28 DLR (3d) 207 (BC). It may be possible to sue in restitution: *Lachhani v Destination Canada (UK) Ltd* (1997) 13 Const LJ 279, [1997] 9 CL 144.

25 *Kleinwort Benson Ltd v Malaysian Mining Corp* [1989] 1 All ER 785, [1989] 1 WLR 379, CA. As to letters of comfort see para 668 ante.

26 *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504; and see paras 618 ante, 1072 et seq post.

## UPDATE

### 674 Commercial agreements

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(2) OFFER AND ACCEPTANCE/(iv) Incomplete Agreements/675. Partially executed agreements.

### 675. Partially executed agreements.

Where an 'agreement' remains executory on one side, but has been wholly or partially executed on the other, the very fact of execution may itself tend to lead to the conclusion that the 'agreement' is binding<sup>1</sup>; or, where it is only partially executed on the one side, the court may alternatively deduce that there is a binding contract broadly on the terms of the 'agreement', but merely in respect of the executed part<sup>2</sup>; and, where the 'agreement' has been partly or wholly executed on both sides, it would seem probable that the courts would give their assistance<sup>3</sup>, even sometimes to the extent of giving retrospective effect to the terms eventually agreed<sup>4</sup>.

It is especially common in the case of large commercial agreements to find that terms which would probably be too vague and incomplete to constitute a binding contract whilst the matter remains wholly executory tend to be held binding when they have been wholly or partially acted upon<sup>5</sup>, as in a sale of land by a garage (A) to a coach operator (B) on the express condition that B would buy all his petrol from A 'at a price to be agreed by the parties from time to time'<sup>6</sup>. Further instances of this approach may be found in 'forward contracts', as where the parties provide for the renewal of an existing contract on terms which are not clearly defined<sup>7</sup>; or a commercial 'licensing' agreement which does not specify prices or quantities of goods to be handled by the licensee<sup>8</sup>; or where there is a common usage in a trade to use a particular standard form of contract<sup>9</sup>; or a contract for immediate insurance 'at a premium to be arranged'<sup>10</sup>; or where work commenced whilst the parties continued to negotiate the terms of a building contract<sup>11</sup>.

Similar problems have arisen in relation to rent review clauses in leases which fail to set out the machinery for implementing the review<sup>12</sup>. Prima facie, such a rent review clause is ineffective<sup>13</sup>, with the result that, in respect of that period of the lease<sup>14</sup>, either the old rent will continue to be payable<sup>15</sup>; or a reasonable rent must be paid<sup>16</sup>.

In the above situations, a partially executed agreement will not necessarily fail merely on the ground that it envisages further agreement between the parties. Should the parties subsequently fail to agree the outstanding matters, it has been said that the contract will only fail if that failure makes it 'unworkable or void for uncertainty'<sup>17</sup>; and that that it is unlikely to be the outcome where the outstanding matter is only of subsidiary importance<sup>18</sup>. On the other hand, the 'agreement' is likely to fail as a contract where the outstanding matter is substantial<sup>19</sup>; and a remedy can then only be sought in restitution<sup>20</sup> or tort<sup>21</sup>.

1 *Hart v Hart* (1881) 18 ChD 670 at 685 per Kay J; *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 263-264, CA, per Lindley LJ, at 267-268 per Bowen LJ and at 274 per AL Smith LJ. See also *Bryant v Flight* (1839) 5 M & W 114; *Powell v Braun* [1954] 1 All ER 484, [1954] 1 WLR 401, CA; *LCC v Henry Boot & Sons Ltd* [1959] 3 All ER 636, [1959] 1 WLR 1069, HL; *Edwards v Skyways Ltd* [1964] 1 All ER 494, [1964] 1 WLR 349; *ADS (Aerial) v Snell* [1972] CLY 508; *Hammond v VAM Ltd* [1972] 2 NSWLR 16 (Aust). But see *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, [1965] 1 WLR 335.

2 *Bishop and Baxter Ltd v Anglo-Eastern Trading and Industrial Co Ltd* [1944] KB 12, [1943] 2 All ER 598; *Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201, [1969] 1 WLR 1378, CA.

3 It is fairly common, particularly in large commercial 'contracts', for the two parties to continue to send each other counter-offers in what has become known as the 'battle of the forms' (as to which see para 664 ante) after they have commenced performance, and even up to completion of the envisaged project. Sometimes, this may result in a concluded contract, as in the 'last shot' doctrine (see para 664 ante). If not, presumably, there is a fairly strong degree of likelihood that in such circumstances a court will decide that there

is a contract on one of the following bases: (1) the terms agreed, with the court's idea of what are reasonable terms being supplied to fill all areas of omission or disagreement (see para 674 note 18 ante); or (2) the entire contract being constructed on the basis of what the court thinks is reasonable, the terms which the parties have agreed being evidence of what is reasonable in the circumstances (see para 618 ante).

4 *Trollope & Colls Ltd v Atomic Power Constructors Ltd* [1962] 3 All ER 1035, [1963] 1 WLR 333; *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 at 511 per Robert Goff J; *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, CA. But evidence of eventual agreement is not admissible to interpret a contract; see para 622 ante.

5 See eg *J Gordon Alison & Co Ltd v Wallsend Slipway and Engineering Co Ltd* (1927) 43 TLR 323, CA (sale of goods); *Triefus v Winston* (1941) 85 Sol Jo 10; *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099, CA (employment); *Pallant v Morgan* [1953] Ch 43, [1952] 2 All ER 951 (sale of land); *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL (charterparty); *Rolland v Dashwood & Partners (Marine) Ltd* [1963] 1 Lloyd's Rep 348 (services); *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30, CA (lease); *Darvell v Basildon Development Corpn* (1969) 211 Estates Gazette 33 (sale of land); *Trustees of National Deposit Friendly Society v Beatties of London Ltd* (1985) 275 Estates Gazette 54 (option to lease part of reconstructed premises granted in exchange for vacating old premises). See also *McGillycuddy v Joy* [1959] IR 189; *MR Hornibrook (Pty) Ltd v Eric Newham (Wallerawang) Pty Ltd* (1971) 45 ALJR 523, Aust HC; *Marquest Industries Ltd v Willows Poultry Farms Ltd* (1968) 66 WWR 477, 1 DLR (3d) 513, BC CA.

6 *Foley v Classique Coaches Ltd* [1934] 2 KB 1, CA (petrol 'agreement' acted on for three years). See also *Re Brand Estates Ltd* [1936] 3 All ER 374 (publisher free to cancel if in his opinion insufficient advertising obtainable); *British Bank for Foreign Trade v Novinex Ltd* [1949] 1 KB 623, [1949] 1 All ER 155, CA ('We also undertake to cover you on this transaction with an agreed commission' if direct contract with supplier arranged. Direct contract then arranged); *Brown & Gracie Ltd v FW Green & Co Pty Ltd* [1960] 1 Lloyd's Rep 289, HL (sellers contracted 'dependent only on the availability of shipping'); *Tropwood AG of Zug v Jade Enterprises, The Tropwind* [1982] 1 Lloyd's Rep 232, CA (charterparty, charterer to be allowed a deduction in respect of estimated bunkers (for another point see para 673 note 1 ante)); *Superior Overseas Development Corpn v British Gas Corpn* [1982] 1 Lloyd's Rep 262, CA (wholesale gas contract provided that, if either party felt that there had been a substantial change in economic circumstances causing it to suffer substantial economic hardship, the parties should meet to consider price adjustment); *Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd* [1997] 1 CL 117, CA (gas take or pay contract). But see *Newman Industries Ltd v Indo-British Industries Ltd* [1957] 1 Lloyd's Rep 211, CA (introduction of new form of guarantee held not to void contract).

7 See eg *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, HL; *F and G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep 53, CA; *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, HL, reporting the decision of Roskill J at first instance; *R and J Dempster Ltd v Motherwell Bridge and Engineering Co Ltd* 1964 SC 308.

8 *Winsco Manufacturing Ltd v Raymond Distributing Co Ltd* [1957] OR 565, 10 DLR (2d) 699 (Ont); *National Bowling and Billiards Ltd v Double Diamond Bowling Supply Ltd and Automatic Pinsetters Ltd* (1961) 27 DLR (2d) 342 (BC). But see *Cherewick v Moore and Dean* [1955] 2 DLR 492 (BC).

9 See the cases cited in para 780 note 15 post. As to standard form contracts see para 771 post. As to implication by common usage see para 780 post.

10 *Glicksten & Son Ltd v State Assurance Co Ltd* (1922) 10 Ll L Rep 604.

11 *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, CA. As to retrospective effect see note 4 supra.

12 As to rent review see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 292 et seq.

13 *King v King* (1981) 41 P & CR 311.

14 It is unlikely that such a lease would then become void, nor that no rent need be paid for the remainder of the term: see *Beer v Bowden* [1981] 1 All ER 1070 at 1076, [1981] 1 WLR 522 at 527-528, CA, per Geoffrey Lane LJ.

15 *King v King* (1981) 41 P & CR 311 (under an implied term). Such a result was criticised in *Beer v Bowden* [1981] 1 All ER 1070 at 1073, [1981] 1 WLR 522n at 524-525, CA, per Goff LJ. Distinguish where the original rent continues because of the failure of a condition precedent to which the rent review clause is subject: *Weller v Akehurst* [1981] 3 All ER 411 (clause invoked too late, time being of the essence).

16 *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522n, CA (under an implied term); *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA. A similar result may be

reached by: (1) an express term: *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505 (option: see para 640 ante); (2) reference to a third party: see para 667 note 19 ante.

17 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619.

18 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL (option to purchase reversion: see para 674 note 6 ante); *Neilson v Stewart* 1991 SLT 523, HL (another explanation of the case is that the House of Lords agreed with the seller of the shares that there was a separate severable contract for the loan of the price).

19 See eg *Shackleford's Case* (1866) 1 Ch App 567 (application for shares); *Bertel v Neveux* (1878) 39 LT 257 (contract of employment); *Loftus v Roberts* (1902) 18 TLR 532 (similar case); *Hofflinghouse & Co Ltd v C-Trade SA, The Intra Transporter* [1986] 2 Lloyd's Rep 132, CA (voyage charter); *Pagnan SpA v Granaria BV* [1986] 2 Lloyd's Rep 547, CA (reciprocal sales of goods).

20 *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234; *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 at 511 per Robert Goff J. As to restitution see paras 618 ante, 1072 et seq post. See also *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551 at 556, [1950] 2 All ER 1099 at 1104, CA, per Denning LJ; and para 608 note 5 ante.

21 See para 608 note 6 ante; and TORT.

## UPDATE

### 675 Partially executed agreements

NOTE 1--See *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 (Ch), [2003] EMLR 790 (music licensing agreement; agreement binding after manufacture of album).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/676. The general postal rule.

### **(3) CONTRACTS MADE AT A DISTANCE**

#### **676. The general postal rule.**

In modern times, contracts negotiated at a distance tended to be made by correspondence<sup>1</sup> exchanged through the post administered by the Post Office<sup>2</sup>. Except as stated below, all communications with respect to the formation of a contract which are sent through the medium of the Post Office have the legal effects previously outlined<sup>3</sup>. However, where such a communication is sent through the medium of the Post Office, there is said to be a general rule<sup>4</sup> that a properly-addressed<sup>5</sup> postal acceptance is complete when the letter of acceptance is posted<sup>6</sup>. Ordinarily, a letter is not 'posted' until it is put in a Post Office letter box<sup>7</sup>. Thus, the delivery of a letter to a postman outside the course of his ordinary duties is not a posting of the letter, nor will such a letter be assumed to be in the lawful custody of the Post Office as soon as the postman enters the office<sup>8</sup>.

The following consequences are said to follow from this 'postal rule'<sup>9</sup>: (1) a postal revocation of an offer only takes effect on receipt, provided that the revocation is communicated<sup>10</sup>, so that an acceptance posted at any time before that receipt prevails<sup>11</sup>; (2) a postal acceptance takes effect on posting even though accidentally lost or delayed in the post<sup>12</sup>; and (3) a postal acceptance of an offer relating to title of goods takes effect in priority to another contract affecting the same subject-matter but made after posting of the first acceptance<sup>13</sup>.

This analysis leaves undecided two questions, namely the operative time and effect of a revocation of postal acceptance<sup>14</sup> and of a postal rejection of an offer<sup>15</sup>. Furthermore, there are special complications which may arise in the case of communications by international telegram<sup>16</sup> and international sales<sup>17</sup>. From these postal communications must be distinguished instantaneous communications<sup>18</sup>.

1 As to contracts by correspondence see para 668 ante.

2 See generally POST OFFICE.

3 See paras 629-674 ante.

4 As to the scope of this rule see para 677 post.

5 See para 678 post.

6 *Dunlop v Higgins* (1848) 1 HL Cas 381; *Potter v Sanders* (1846) 6 Hare 1; *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, CA; *Henthorn v Fraser* [1892] 2 Ch 27, CA; *Re Imperial Land Co of Marseilles, Harris' Case* (1872) 7 Ch App 587; *Bruner v Moore* [1904] 1 Ch 305; *Morrell v Studd and Millington* [1913] 2 Ch 648; *Meggesson v Groves* [1917] 1 Ch 158; *Sanderson v Cunningham* [1919] 2 IR 234.

7 For the meaning of 'post office letter box' see the Post Office Act 1953 s 87(1) (as amended); and for the period during which a postal packet is deemed to be in course of post see s 87(2)(a) (a postal packet is deemed to be in the course of transmission by post from the time of its being delivered to any post office to the time of its being delivered to the addressee). See further POST OFFICE.

8 *Re London and Northern Bank, ex p Jones* [1900] 1 Ch 220. But a letter would be 'posted' where the rules of the Post Office permit a postman to take letters intended for posting from members of the public, perhaps in a rural area.

9 It is submitted that these are not logical deductions which necessarily flow from the postal rule of acceptance; nor are those consequences necessarily consistent inter se. In fact, the postal rule of acceptance is

a policy-based exception to the general rule: *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216 at 224, 232, CA, per Thesiger and Baggallay LJ; and see para 677 post. The various 'consequences' represent policy decisions as to how far this exceptions should be taken.

10 This is the ordinary rule for revocation of an offer: see para 644 ante.

11 *Byrne & Co v Van Tienhoven & Co* (1880) 5 CPD 344; *Re Imperial Land Co of Marseilles, Townsend's Case*(1871) LR 13 Eq 148; *Re Imperial Land Co of Marseilles, Harris' Case*(1872) 7 Ch App 587; *Re Scottish Petroleum Co, MacLagan's Case* (1882) 51 LJ Ch 841; *Henthorn v Fraser*[1892] 2 Ch 27, CA; *Raeburn and Verel v Burness & Sons* (1895) 1 Com Cas 22; *Re London and Northern Bank, ex p Jones*[1900] 1 Ch 220; *Manchester Diocesan Council for Education v Commercial and General Investments Ltd*[1969] 3 All ER 1593, [1970] 1 WLR 241 (see para 644 note 10 ante); *Thomson v James* (1855) 18 Dunl 1, Ct of Sess.

12 As to loss or delay of postal communications see para 679 post.

13 *Potter v Sanders* (1846) 6 Hare 1. But there are certain rules whereunder the second buyer may acquire a better title to the subject matter than the first buyer. As to sales of goods see the Sale of Goods Act 1979 s 25(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 158, 254. Moreover, the rule stated in the text can now have no effect in respect of contracts to transfer an interest in land: see para 624 ante.

14 As to postal revocation of an acceptance see para 680 post.

15 As to postal rejection of an offer see para 681 post.

16 As to telegraphed communications see para 682 post.

17 As to international sales see para 684 post.

18 As to instantaneous communications see para 683 post.

## UPDATE

### 676 The general postal rule

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/677. The scope of the postal rule.

### 677. The scope of the postal rule.

It is presumed that, unless the offeror exclusively prescribes some different mode of acceptance<sup>1</sup>, an offer made through the post may be accepted by post<sup>2</sup>. Furthermore, even where an offer is not made by post, if the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance, the offer may be accepted by a letter sent through the post<sup>3</sup>. Such posted acceptances prima facie take effect on posting<sup>4</sup>. However, if an offer does not fall within the above circumstances, or if it does but the postal rule is ousted<sup>5</sup>, a posted letter of acceptance will have one of the following effects: (1) the acceptance may fail entirely, as where it is too late<sup>6</sup>; or (2) it may take effect only on receipt, as where the offer stipulated for 'notice in writing to' the offeror<sup>7</sup>. Contracts made by international telegram are in substantially the same position<sup>8</sup>.

Various unconvincing reasons for the postal rule have been judicially suggested. First, it has been argued that, if the rule did not exist, no contract could ever be completed by post because neither party should be bound until he knew the other had received his communication<sup>9</sup>. Secondly, it has been explained on the basis that the Post Office is the common agent of both parties<sup>10</sup>; but, of course, the Post Office is only the agent to carry, not to receive, the communications<sup>11</sup>. Thirdly, it has been said that English law favours the offeree because it is the offeror who 'trusts the post'<sup>12</sup>. Fourthly, by way of explanation it has been argued that the offeror must be considered as making the offer all the time his offer is in the post, and therefore the agreement is complete as soon as the acceptance is posted<sup>13</sup>. In truth, the rule is an arbitrary one<sup>14</sup>, being little better than the possible alternatives<sup>15</sup>; and it is, perhaps, linked with the Post Office practice that a posted letter cannot be retrieved<sup>16</sup>.

1 As to the modes of acceptance see generally paras 653-658 ante.

2 *Byrne & Co v Van Tienhoven & Co* (1880) 5 CPD 344 at 348 per Lindley J. See also *Dunlop v Higgins* (1848) 1 HL Cas 381.

3 *Henthorn v Fraser* [1892] 2 Ch 27 at 33, CA, per Lord Herschell. See also *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, CA; *Bruner v Moore* [1904] 1 Ch 305 (exercise of option). Cf *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA. It probably would not be reasonable to reply by letter where the offeree knew that the postal services were disrupted (*Bal v Van Staden* [1902] TS 128); nor perhaps to reply by second class post to an offer sent by first class post.

4 See para 676 ante.

5 *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA (exercise of option). Cf *Bell v Littlewoods Pools* [1954] CLY 1412 (posted pools coupon lost). It is otherwise where the method of acceptance was permissive rather than obligatory: *Yates Building Co Ltd v RJ Pulleyn & Sons (York) Ltd* [1976] 1 EGLR 157, CA; and see para 654 note 19 ante.

6 *Quenerduaine v Cole* (1883) 32 WR 185 (telegram offer; posted reply); and see para 646 ante.

7 *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA. This would seem to be by application of the ordinary rule for communication of acceptance, as to which see para 659 ante.

8 *Bruner v Moore* [1904] 1 Ch 305; and see para 682 post.

9 *Adams v Lindsell* (1818) 1 B & Ald 681 at 683, obiter (for consideration of this case see para 678 post).

10 *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216 at 221, CA, per Thesiger LJ.

11 See para 659 note 17 ante.

12 And that the offeror can safeguard himself by stipulating for actual communication of acceptance (see note 5 supra): *Household Fire Insurance Co Ltd v Grant* (1879) 4 Ex D 216 at 223 per Thesiger LJ. But it is not the offeror who necessarily first 'trusts the the post': the postal rule also sometimes operates where the offer is oral (see note 3 supra); or the offer may be a counter-offer (as to which see para 663 ante), with the offeree having made the first offer by post; or the terms may have been dictated by the offeree in an invitation to treat, as in a tender (see para 635 ante).

13 *Henthorn v Fraser* [1892] 2 Ch 27 at 31, CA, per Lord Herschell. This is an attempt to make the postal rule fit in with the classical consensus theory, as to which see para 631 ante.

14 It is a rule of convenience: *Harris' Case* (1872) 7 Ch App 587 at 594 per Mellish LJ; *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216 at 224, 232, CA, per Thesiger and Baggallay LJ (but see the strong dissenting opinion of Bramwell LJ at 235-236); *Holwell Securities Ltd v Hughes* [1973] 2 All ER 476 at 483, [1973] 1 WLR 757 at 764 per Templeman J (affd [1974] 1 All ER 161, [1974] 1 WLR 155, CA); *Brinkibon Ltd v Stahag Stahl und Stahlwarengesellschaft mbH* [1983] 2 AC 34 at 41, [1982] 1 All ER 293 at 295, HL, per Lord Wilberforce; *Gill and Duffus Landauer Ltd v London Export Corp'n GmbH* [1982] 2 Lloyd's Rep 627 at 631 per Robert Goff J. See also *Dick v United States* 82 F Supp 326 (USA, 1949).

15 The major alternatives are that acceptance is effective: (1) when delivered to the offeror's address; (2) when the letter of acceptance is brought to the actual attention of the offeror. See further (1939) 55 LQR 499.

16 It is the general practice in the Post Office to refuse to return a 'postal packet' to the sender: see POST OFFICE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/678. Misdirected postal communications.

### **678. Misdirected postal communications.**

It would seem probable that the postal rule<sup>1</sup> is *prima facie* limited to properly addressed and stamped letters of acceptance<sup>2</sup>, and that if the letter of acceptance is misdirected because, for example, it is wrongly or incompletely or illegibly addressed, or inadequately stamped, the acceptance would date from the time of actual communication, as under the ordinary rule<sup>3</sup>; but it is unlikely that the postal rule would be ousted if the misdirection is immaterial<sup>4</sup>, or if the offeror is estopped from setting up the misdirection<sup>5</sup>.

Even if an offer sent by post operates as an offer from the time of posting<sup>6</sup>, it is considered that a materially misdirected posted offer should only operate from receipt<sup>7</sup>. Moreover, where a misdirected posted offer asks for a reply by return of post, it is thought that the position should be as follows: the ordinary rule that such an offer may be accepted by an answer posted on the day of receiving the offer<sup>8</sup> should only apply where either the misdirection has not caused a delay in receipt of the offer, or any such delay is not obvious to the offeree<sup>9</sup>; and that in all other cases the offer is incapable of acceptance because it has expired before acceptance<sup>10</sup>.

1 See para 676 ante.

2 Cf *Getreide-Import-Gesellschaft mbh v Contimar SA Compania Industrial Comercial y Maritima* [1953] 2 All ER 223, [1953] 1 WLR 793, CA (posting of notice of appeal from arbitrator's award). See also the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 66.

3 Cf *Re Imperial Land Co of Marseilles, Townsend's Case* (1871) LR 13 Eq 148 (the actual decision has now been overtaken by the postal rule). As to communication of acceptance see para 659 ante. The distinction may be supported on the grounds that the offeror takes the risk of any wholly accidental loss or delay in the post (see paras 679-680 post), but not of the offeree's negligence.

4 Presumably, a misdirection is material for this purpose if it affects the post by which a letter is delivered.

5 Eg where the offeror makes a mistake in writing his own address on the letter, or uses an obsolete letter-head with a different address, and the offeree is thereby misled; cf *Re Imperial Land Co of Marseilles, Townsend's Case* (1871) LR 13 Eq 148.

6 See para 642 ante.

7 Contra *Adams v Lindsell* (1818) 1 B & Ald 681 at 683, obiter.

8 See para 646 note 13 ante.

9 It is considered that this is the best explanation of the decision in *Adams v Lindsell* (1818) 1 B & Ald 681; namely, that the offeror was estopped from denying that the acceptance was 'in course of post'.

10 See para 646 note 2 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/679. Delay and loss in post.

**679. Delay and loss in post.**

Where the postal rule applies<sup>1</sup>, the acceptor is not responsible for any delay or failure on the part of the Post Office<sup>2</sup>, provided that it is not caused by any default on his part<sup>3</sup>. Thus, even though he was unaware of that fact<sup>4</sup>, the offeror is bound by the acceptance from the time when it was posted, notwithstanding that the letter of acceptance is lost in the post<sup>5</sup>, or that its delivery is delayed<sup>6</sup>, or that it is returned to the acceptor owing to a mistake in the address caused by the person who made the offer<sup>7</sup>.

1 See para 676 ante. The offer may, however, place the risk on the acceptor: see para 677 ante.

2 The Post Office is not liable in respect of any delay or failure to deliver any communication; it does not enter into any contract of carriage (see *Whitfield v Lord le Despencer* (1778) 2 Cowp 754); nor is it generally liable in tort (see the Post Office Act 1969 ss 29, 30 (as amended)). See further POST OFFICE.

3 See para 678 note 3 ante.

4 If the offeror became aware of the posted acceptance by other means, presumably those other means might constitute an alternative means of acceptance, as to which see para 658 ante.

5 *Duncan v Topham* (1849) 8 CB 225; *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 Ex D 216, CA (acceptor issuing shares unaware that his acceptance lost in the post for over three years. This decision overruled *British and American Telegraph Co Ltd v Colson* (1871) LR 6 Exch 108).

6 *Dunlop v Higgins* (1848) 1 HL Cas 381 at 397-398 per Lord Cottenham LC (presumably good authority, even though decision explicitly limited to Scots law).

7 *Adams v Lindsell* (1818) 1 B & Ald 681; *Re Imperial Land Co of Marseilles, Townsend's Case* (1871) LR 13 Eq 148. It is otherwise if the terms of the offer were supplied by the offeree, eg in a tender (see para 635 ante).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/680. Revocation of posted acceptance.

### 680. Revocation of posted acceptance.

Where there is a posted acceptance which falls within the postal rule<sup>1</sup>, and the offeree subsequently by some other means purports to revoke his acceptance by a communication which reaches the offeror before the posted acceptance<sup>2</sup>, two questions arise: (1) can a posted acceptance be revoked in this manner?; and (2) can the offeror rely on such a revocation?

Where the postal rule applies, a properly addressed acceptance *prima facie* dates from posting<sup>3</sup>. It might therefore be argued that, as the contract dates from posting, the subsequent communication cannot revoke it<sup>4</sup>. On the other hand, the postal rule is itself based on policy rather than logic<sup>5</sup>, so that there is no reason why its scope should not equally be determined by convenience<sup>6</sup>. To allow such a revocation to take effect on receipt<sup>7</sup> would not in any way damage the offeror<sup>8</sup>; but it would leave the offeree with a discretion, in that he could post a letter of acceptance knowing that he thereby bound the offeror and yet retained a discretion to revoke his acceptance at any time before that letter was delivered<sup>9</sup>.

Where the offeror acts on the communicated revocation<sup>10</sup>, the offeree cannot hold him to the posted acceptance whatever the view taken as to the efficacy of that revocation. No problem arises if the revocation is held to take priority over the acceptance<sup>11</sup>; and, even if it does not, the offeree's claim may fail for one of the following reasons: (a) the communicated revocation may be regarded as an offer to rescind the contract<sup>12</sup> accepted by the offeror's conduct<sup>13</sup>; or (b) the communicated revocation may be regarded as a repudiation which the offeror may accept by conduct<sup>14</sup>.

1 As to the scope of the postal rule see para 677 ante.

2 Eg by fax, as to which see para 683 post. It seems probable that this situation would include that where the letter of acceptance and the revocation are delivered simultaneously: see *Countess of Dunmore v Alexander* (1830) 9 Sh 190, Ct of Sess (discussed in note 7 infra). As to what constitutes a delivery of a communication see para 644 notes 6-7 ante. As to the ordinary rule of revocation of acceptance see para 666 ante.

3 See para 676 ante. Apart from the situation expressed in note 2 supra, no difficulty will usually arise where the postal rule is ousted, and the acceptance follows the ordinary rule (see para 678 ante) which usually requires that acceptance be communicated (see para 659 ante).

4 Cf *Wenckheim v Arndt* (1873) 1 NZ Jur 73; *Morrison v Thoeke* 155 So 2d 889 (USA 1953); *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* (1974)(4) SA 392(C). Contra *Dick v United States* 82 F Supp 326 (USA, 1949).

5 See para 676 note 9 ante.

6 See para 677 note 14 ante.

7 *Countess of Dunmore v Alexander* (1830) 9 Sh 190, Ct of Sess (offer made via Lady A; latter forwarded posted acceptance to offeror, and subsequently forwarded postal revocation by express post; and offeror received both letters together. Held: no contract. On the facts, there is much to be said for the view of the dissenting judge that Lady A was the common agent of the parties, so that the acceptance bound from her receipt of it: see para 659 notes 17-18 ante). As to simultaneous communication see note 2 supra; and as to communication to an authorised agent see para 659 note 17 ante; and AH Hudson (1966) 82 LQR 169. Presumably there is no question of it being effective on posting; cf postal rejections, as to which see para 681 note 4 post.

8 Because *ex hypothesi* the revocation would reach him before the acceptance, so that he could hardly be said to have acted on the 'acceptance', though he might well act on the 'revocation' (as to which see the text to notes 10-14 infra).

9 Such a discretion might equally be used if the offeree made a genuine mistake from which the law did not offer relief, or if the market moved against him. It is submitted that he either has, or has not, such a discretion, regardless of the reason why he sought to exercise it. At all events, the offeror can oust the postal rule entirely and thus avoid the difficulty: see para 677 note 5 ante. As to international sales see para 684 post.

10 See eg by first offering by post to sell goods to A and then acting on A's revocation of his acceptance by selling those goods to B.

11 See note 8 supra.

12 As to variation of contracts see para 1019 et seq post.

13 As to the modes of acceptance see paras 653-658 ante.

14 As to repudiation see para 997 et seq post. This second analysis is more favourable to the offeror than the first, in that he may be able to claim damages from the offeree. As to estoppel see para 702 post.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/681. Rejection of offer.

### **681. Rejection of offer.**

The ordinary rule is that rejection of an offer terminates the power of acceptance from the moment that the rejection is communicated to the offeror<sup>1</sup>. However, where there is a posted rejection in circumstances which fall within the postal rule<sup>2</sup>, the question arises whether the rejection takes effect from posting, as would any acceptance<sup>3</sup>.

Whilst the question has never been decided by the English courts, it is thought that the preferable rule is that the posted rejection should date from receipt<sup>4</sup>. It would follow that the offeree could retrieve his rejection by an acceptance which was actually communicated to the offeror before the posted rejection<sup>5</sup>. On the other hand, it should not be possible to retrieve the rejection by a subsequently posted acceptance which did not reach the offeror until after the rejection<sup>6</sup>.

1 See para 645 ante.

2 As to the scope of the postal rule see para 677 ante.

3 As to the operative time of a postal acceptance see para 676 ante.

4 American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 40. The rule is probably the same for a postal revocation of acceptance: see para 680 ante.

5 See the American Law Institute's *Restatement of the Law of Contract (2d)* (1981) s 40. Presumably, this rule would apply to a simultaneous receipt by the offeror of the rejection and acceptance (see para 680 note 2 ante) where it was clear that the acceptance was intended to 'overtake' the rejection; but not vice versa (see para 680 ante).

6 See the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 40: 'Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer.'

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/682. Telegraphed communications.

## **682. Telegraphed communications.**

Whilst contracts made by telex or telephone follow the ordinary rules of offer and acceptance<sup>1</sup>, those made by inland telegram were in much the same position as those made by posted letter in that, within the scope of the rule, acceptance *prima facie* dated from the time the telegram of acceptance was given to the person authorised to receive it for transmission<sup>2</sup>. Since 1982, the system of telegrams operated by the Post Office has been replaced with regard to the inland service<sup>3</sup> but there is still an international telegram service which is now operated by British Telecommunications plc<sup>4</sup>. As with posted letters<sup>5</sup>, telegrams may not be intercepted (except in obedience to a warrant issued by the Secretary of State)<sup>6</sup>, from which it may be deduced that where the contract is governed by English law, telegrams should follow the same legal rules as posted letters<sup>7</sup>.

This rule as to the operative date of the telegraphed acceptance applies wherever there is express or implied permission to accept by telegram<sup>8</sup>. Thus, an offer made by telegram may *prima facie* be accepted by telegram<sup>9</sup>, as may an offer made by letter<sup>10</sup>. On the other hand, an offer made by telegram, even a reply-paid telegram, does not necessarily require acceptance by telegram; *prima facie* it is merely a request for a prompt reply<sup>11</sup>. Where, however, the acceptance is sent by telegram, then *prima facie* the postal rules apply not only as to the operative date of acceptance<sup>12</sup>, but also as to the risk of loss or delay<sup>13</sup>, revocation of acceptance<sup>14</sup> and rejection of offer<sup>15</sup>.

A problem peculiarly likely to arise in this form of communication is that the telegram may be garbled in transmission. As British Telecommunications plc is only the agent of the parties to carry their communications<sup>16</sup>, neither party is responsible if the error is wholly the fault of British Telecommunications plc<sup>17</sup>. Thus, a garbled offer cannot, in such circumstances, be accepted in terms other than those in which the offeror communicated it<sup>18</sup>; but it may be otherwise if there is ambiguity due to the fault of the offeror<sup>19</sup>. On the other hand, it would follow from the postal rule of acceptance that the offeror is, *prima facie*<sup>20</sup>, bound by a telegram of acceptance<sup>21</sup> even though garbled in the course of transmission<sup>22</sup>.

1 See para 683 post.

2 See *Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346; *L Roth & Co Ltd v Taysen, Townsend & Co* (1896) 12 TLR 211, CA; *Bruner v Moore* [1904] 1 Ch 305. Cf *Cowan v O'Connor* (1888) 20 QBD 640, DC (place of contracting). As to the operative time of acceptance by posted letter see para 676 ante.

3 Internal telegrams were withdrawn in 1982 and replaced with the telemessage service, which presumably now follows the rule for instantaneous communications: see para 683 post.

4 The message may reach British Telecommunications plc via oral (eg by telephone), written (eg via the Post Office) or electronic means.

5 As to the 'posting' of a letter see para 676 note 7 ante.

6 See the Interception of Communications Act 1985 s 1; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 506.

7 See paras 676-681 ante. As to the choice of applicable law see CONFLICT OF LAWS vol 8(3) (Reissue) para 349 et seq.

8 See eg *Northland Airlines Ltd v Dennis Ferranti Meters Ltd* (1970) 114 Sol Jo 845, CA; *Holland v Tolley* [1952] CPL 34, CA. As to the scope of the postal rule see para 677 ante.

9 *Northland Airlines Ltd v Dennis Ferranti Meters Ltd* (1970) 114 Sol Jo 845, CA; *Raeburn and Verel v James Burness & Sons* (1895) 1 Com Cas 22; *Holland v Tolley* [1952] CPL 34, CA.

10 *Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346; *Bruner v Moore* [1904] 1 Ch 305; *Dalrymple v Scott* (1892) 19 AR 477, Ont CA.

11 *Read v Anderson* (1882) 10 QBD 100; *Quenerduaine v Cole* (1883) 32 WR 185. As to the expiry of an offer by lapse of time see para 646 ante; and as to the mode of acceptance see para 654 ante.

12 See note 2 supra.

13 See para 679 ante.

14 See para 680 ante.

15 See para 681 ante.

16 Cf para 659 note 17 ante.

17 Cf para 679 note 2 ante.

18 *Henkel v Pape* (1870) LR 6 Exch 7. Indeed, if an offeree cannot accept an offer unless he knows about it (see para 665 ante), it is difficult to see how the offer is capable of acceptance at all.

19 *Falck v Williams* [1900] AC 176, PC; but see *Ireland v Livingstone* (1872) LR 5 HL 395 at 416 per Lord Chelmsford. See further MISTAKE.

20 But presumably the offeror is not bound if the garbling is due to the fault of the offeree.

21 It is otherwise if the telegram in the form in which it is delivered to British Telecommunications plc amounts to a counter-offer: *Northland Airlines Ltd v Dennis Ferranti Meters Ltd* (1970) 114 Sol Jo 845, CA.

22 It is submitted that this is one of the risks prima facie carried by the offeror. As to risk see para 679 ante.

## UPDATE

### 682 Telegraphed communications

NOTE 6--Interception of Communications Act s 1 repealed: Regulation of Investigatory Powers Act 2000 s 82, Sch 5. See now the 2000 Act Pt 1 (ss 1-25); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 506-526.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/683. Instantaneous communications.

### **683. Instantaneous communications.**

Whilst telegraphed communications<sup>1</sup> generally fall within the postal rule<sup>2</sup>, that rule will not apply to forms of communication which are instantaneous, or virtually so, whether made orally, as by telephone, or in writing, as by telex or telephoned facsimile (fax). It has been said that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received<sup>3</sup>. These instantaneous forms of communication are therefore treated like contracts made face-to-face: they are governed by the general rule that acceptance must actually be communicated<sup>4</sup>. The reason has been said to be that, unlike postal communications, those made by telex or telephone are generally acknowledged by the recipient<sup>5</sup>; and, from this reasoning, it would follow that an acceptance by international telegram dictated over the telephone follows the postal rule, that is, where the contract is governed by English law the acceptance takes effect when dictated<sup>6</sup>.

The above analysis has been applied to communications by telex<sup>7</sup> or telephone<sup>8</sup>. Whilst there are as yet no specific authorities, on the basis of the criterion of whether or not the acceptor will know that his message has, or has not, been received, it may be that the rules considered in this paragraph will also apply to acceptances sent by fax, e-mail or electronic data exchange<sup>9</sup>.

1 See para 682 ante.

2 See paras 676-681 ante.

3 *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327 at 333-334, [1955] 2 All ER 493 at 495-496, CA, per Denning LJ.

4 See para 659 ante.

5 *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327 at 333, [1955] 2 All ER 493 at 495, CA, per Denning LJ.

6 As to the time within which an offer made by post or telegram may be accepted see para 646 ante. As to the operative time of postal acceptance see para 676 ante. As to the choice of applicable law see CONFLICT OF LAWS vol 8(3) (Reissue) para 349 et seq.

7 *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327, [1955] 2 All ER 493, CA (counter-offer telexed from England to Holland; acceptance telexed from Holland to England. Held: contract made in England where acceptance received); *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34, [1982] 1 All ER 293, HL (offer telexed from Austria to England; acceptance telexed from England to Austria. Held: contract made in Austria); and as to service of writs out of the jurisdiction see RSC Ord 11 r 1. Cf cases on the commencement of arbitration: see *NV Stoomv Maats 'De Maas' v Nippon Yusen Kaisha, The Pendrecht* [1980] 2 Lloyd's Rep 56; and see now the Arbitration Act 1996 s 14; and ARBITRATION vol 2 (2008) PARA 1219.

8 Cf *Domb v Isoz* [1980] Ch 548, [1980] 1 All ER 942, CA (agreement by telephone to treat contracts for the sale of land as exchanged).

9 These problems will become increasingly important with the expansion of the Internet.

## **UPDATE**

### **683 Instantaneous communications**

NOTE 7--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(3) CONTRACTS MADE AT A DISTANCE/684. International sales.

#### 684. International sales.

Where a contract for the sale of goods falls within the Uniform Laws on International Sales Act 1967<sup>1</sup>, that Act lays down provisions<sup>2</sup> as to the formation of an English contract<sup>3</sup>. The following of those provisions would appear to preserve the English common law:

- 34 (1) a term of an offer stipulating that silence shall amount to acceptance is invalid<sup>4</sup>;
- 35 (2) no special form of contract is required<sup>5</sup>;
- 36 (3) an offer must be definite and indicate an intention to be bound<sup>6</sup>;
- 37 (4) an offer must be read in the light of the preliminary negotiations, practice between the parties, and trade usage<sup>7</sup>;
- 38 (5) an offer does not bind the offeror until it has been communicated to the offeree<sup>8</sup>;
- 39 (6) an offer lapses if withdrawal is communicated to the offeree before or at the same time as the offer<sup>9</sup>;
- 40 (7) a revocation of offer is only effective if communicated to the offeree before he has dispatched his acceptance<sup>10</sup>;
- 41 (8) acceptance may prima facie be communicated by any means whatsoever<sup>11</sup>;
- 42 (9) acceptance may be express or implied<sup>12</sup>;
- 43 (10) a conditional acceptance prima facie<sup>13</sup> amounts to a rejection<sup>14</sup>;
- 44 (11) an offer lapses by effluxion of time and may not thereafter be accepted<sup>15</sup>;
- 45 (12) acceptance can only be revoked by a communication which reaches the offeror before, or at the same time as, the acceptance<sup>16</sup>;
- 46 (13) prima facie, the formation of a contract is not affected by the death of one of the parties<sup>17</sup>.

The following provisions do, however, prima facie supersede the English common law<sup>18</sup>:

- 47 (a) after it has been communicated to the offeree, an offer can prima facie be revoked in good faith at any time before acceptance<sup>19</sup>; but it cannot be revoked during this period in bad faith, or if the revocation is not in conformity with fair dealing, or within the period during which it was stated the offer would remain open, or if it was otherwise expressly or impliedly indicated that it was firm or irrevocable<sup>20</sup>;
- 48 (b) a purported acceptance which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror promptly objects to the discrepancy; but, if he does not so object, the terms of the contract are to be the terms of the offer with the modifications contained in the acceptance<sup>21</sup>;
- 49 (c) if acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor, either orally or by dispatch of a notice<sup>22</sup>;
- 50 (d) a posted acceptance takes effect when it is communicated to the offeror<sup>23</sup>; 'communicated' is defined as delivered at his address<sup>24</sup>;
- 51 (e) whilst there will be no contract if an acceptance is lost in the post<sup>25</sup>, there will be one where the acceptance is merely delayed unless the offeror promptly repudiates<sup>26</sup>.

In due course<sup>27</sup>, international sales may instead be governed by the provisions of the Vienna Convention on Contracts for the International Sale of Goods<sup>28</sup>. Changes made to English law would include the following: offer and acceptance would take effect when they 'reached' the other party<sup>29</sup>, so that there would be no contract if acceptance was lost in the post<sup>30</sup>, but an offer could not be revoked after 'dispatch' of acceptance<sup>31</sup> and a posted acceptance could still be withdrawn before it reached the offeror<sup>32</sup>; and there would be new rules for counter-offers<sup>33</sup>.

- 1 As to the ambit of the Uniform Laws on International Sales Act 1967 see para 629 note 5 ante.
- 2 These are to be found in *ibid* s 2, Sch 2, 'The Uniform Law on the Formation of Contracts for the International Sale of Goods'; known as ULFIS.
- 3 As to the issue of which international contracts are governed by English law see the Contracts (Applicable Law) Act 1990; and CONFLICT OF LAWS vol 8(3) (Reissue) para 349 et seq.
- 4 ULFIS art 2(2); and see para 655 ante.
- 5 *Ibid* art 3; and see para 620 ante.
- 6 *Ibid* art 4(1); and see para 632 ante.
- 7 *Ibid* arts 4(2), 13; and see paras 631, 668 ante, 780 post.
- 8 *Ibid* art 5(1); and see para 642 ante.
- 9 *Ibid* art 5(1); and see para 644 ante.
- 10 *Ibid* art 5(4); and see para 676 ante. 'Dispatch' is not defined.
- 11 *Ibid* art 6(1); and see paras 650, 658-659 ante. But the means must be usual in the circumstances: art 12(2).
- 12 *Ibid* art 6(2); and see paras 653-658 ante.
- 13 But see the text to note 21 *infra*.
- 14 ULFIS art 7(1); and see paras 661, 663 ante.
- 15 *Ibid* art 8(1), 8(3); and see para 646 ante.
- 16 *Ibid* art 10; and see para 680 ante.
- 17 *Ibid* art 11; and see para 648 ante.
- 18 *Ibid* art 2(1).
- 19 As to acceptance see note 11 *supra*.
- 20 ULFIS art 5(2), 5(3). Cf para 644 ante. As to good faith and bad faith see paras 612-614 ante.
- 21 *Ibid* art 7(2). Cf paras 614, 663 ante.
- 22 *Ibid* art 9(1). Cf para 646 ante.
- 23 *Ibid* art 6(1). Cf para 676 ante.
- 24 *Ibid* art 12(1). Cf para 644 notes 6-7 ante.
- 25 Because there is no acceptance until it is communicated: see the text and note 23 *supra*.
- 26 ULFIS art 9(2). Cf para 679 ante.

27 The United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) done at Vienna, 11 April 1980; Misc 24 (1980); Cmd 8074, has not yet been ratified by the United Kingdom; and it would require a new statute to make it part of English law.

28 As to the provisions of the Vienna Convention see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 382.

29 See *ibid* arts 15(1) (offer), 18(2) (acceptance). 'Reach' means communicated to the addressee or delivered to his address: art 24.

30 As to a delayed postal acceptance, it would depend on whether the offeror informed the offeree that he regarded the offer as having lapsed: see *ibid* art 21(2).

31 *Ibid* art 16(1), which does not define 'dispatch'. Cf para 644 ante.

32 *Ibid* art 22. Cf para 680 ante.

33 *Ibid* art 19(2). Cf para 663 ante.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(4) WRITTEN CONTRACTS AND WRITTEN TERMS/(i) Contracts made by Deed/685. In general.

## **(4) WRITTEN CONTRACTS AND WRITTEN TERMS**

### **(i) Contracts made by Deed**

#### **685. In general.**

A contract made by deed is a signed written instrument which is intended to be a deed<sup>1</sup> and which complies with certain statutory formalities<sup>2</sup>. Prima facie, it takes effect on unconditional<sup>3</sup> delivery<sup>4</sup>. Subsequent material alterations are dealt with later in this title<sup>5</sup>.

1 As to contracts by deed see generally para 616 ante; and for contracts which are required to be made by deed see para 621 ante.

2 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 145. As to the incidents of contracts made by deed see para 617 ante. As to the defence of non est factum see para 687 post.

3 As to delivery in escrow (ie conditional delivery) see *Johnson v Baker* (1821) 4 B & Ald 440; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 37 et seq.

4 *Ludford v Gretton* (1576) 2 Plowd 490 at 491; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 60.

5 See para 1056 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(4) WRITTEN CONTRACTS AND WRITTEN TERMS/(ii) Signed Contracts/686. Acceptance by signature.

## (ii) Signed Contracts

### 686. Acceptance by signature.

Contracts in writing under hand only do not form a distinct class either in their general incidents<sup>1</sup> or as to their formation. There are several ways in which such contracts may be formed: (1) there may be a single document which indicates that each party is to become bound on adding his signature to it and, in this case, the first to sign makes an offer<sup>2</sup> and the second to sign accepts<sup>3</sup>; (2) there may be two copies of the document, each party signs one copy, and they then exchange the signed copies and, in this case, the first to deliver his signed copy to the other thereby makes the offer, and the second to deliver thereby accepts<sup>4</sup>; (3) one person may proffer a written document as his offer, and require that the other accept by signature on the document<sup>5</sup>.

The general rule is that a person who accepts an offer made in a written document by signing and delivering that document is bound by all the terms of that document, whether or not he has read them<sup>6</sup>; and this includes any terms incorporated from another document by reference<sup>7</sup>. Whereas in the case of unsigned documents there is a test of reasonableness as to whether its terms are incorporated into the contract<sup>8</sup>, in the case of signed contractual documents the above rule appears to suggest that signature alone demonstrates automatically the necessary consent of a party to incorporate<sup>9</sup> into the contract all the terms contained in the document<sup>10</sup>.

Exceptionally, however, he may be able to escape from some or all of the terms contained in the document because his signature was conditional<sup>11</sup>, or because the contents of the document were misrepresented to him<sup>12</sup>, or on a plea of non est factum<sup>13</sup>, mental incapacity<sup>14</sup>, or mistake<sup>15</sup>; or because one party unilaterally added material terms to the writing after the other's signature<sup>16</sup>; or where the signatory did not realise that the document signed was a contractual document<sup>17</sup>; or by statute as being unreasonable<sup>18</sup> or unfair<sup>19</sup>.

1 The writing may not contain the entire contract: see para 622 ante. As to contracts by correspondence see para 668 ante. As to express terms see para 770 post; and as to standard form contracts see para 771 post.

2 See eg *Financings Ltd v Stimson*[1962] 3 All ER 386, [1962] 1 WLR 1184, CA. For the meaning of an offer see para 632 ante.

3 See eg *Financings Ltd v Stimson*[1962] 3 All ER 386, [1962] 1 WLR 1184, CA. For the meaning of 'acceptance' see para 650 ante.

4 See eg *Eccles v Bryant*[1948] Ch 93, [1947] 2 All ER 865, CA; and see further para 671 ante.

5 See eg *Howatson v Webb*[1908] 1 Ch 1, CA; *Blay v Pollard and Morris*[1930] 1 KB 628, CA (non est factum); *L'Estrange v F Graucob Ltd*[1934] 2 KB 394; *Curtis v Chemical Cleaning and Dyeing Co Ltd*[1951] 1 KB 805, [1951] 1 All ER 631, CA; *Compagnie de Commerce et Commission, Sarl v Parkinson Stove Co Ltd* [1953] 2 Lloyd's Rep 487, CA (formal acceptance slip); *JH Saphir (Merchants) Ltd v AL Zissimos* [1960] 1 Lloyd's Rep 490 (acknowledgement slip).

6 *L'Estrange v F Graucob Ltd*[1934] 2 KB 394; *JH Saphir (Merchants) Ltd v AL Zissimos* [1960] 1 Lloyd's Rep 490; *AF Colverd & Co Ltd v Anglo Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep 352; *Levison v Patent Steam Carpet Cleaning Co Ltd*[1978] QB 69, [1977] 3 All ER 498, CA; *Barclays Bank plc v Schwartz* [1995] CLY 2492, CA (illiteracy). See, however, the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; and para 790 et seq post. As to terms in delivery notes for the sale of goods see SALE OF GOODS AND SUPPLY OF SERVICES.

7 See *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, [1956] 2 All ER 145, HL, especially at 725-726 and at 157-158 per Lord Radcliffe; and see para 770 post (as to the point on frustration see para 897 et seq post; and as to tenders generally see para 635 ante); *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL (purchase order (offer) said: 'Please supply goods or services specified below subject to the instructions and conditions on the facts [sic] hereof and our General Conditions of Contract 24001, obtainable on request, and to the following special conditions, if any, shown on the attached form and numbered'). As to the effect of incorporation expressly or by implication see generally paras 688-689 post.

8 See para 688 post.

9 Distinguish the issue of whether the (incorporated) term fails the statutory tests of reasonableness: see notes 18-19 infra.

10 As to consensus ad idem see para 631 ante; but the test is usually objective (see para 703 post). The Canadian courts have adopted a different attitude, denying that signature proves consent in circumstances where external evidence demonstrates that consent could not be inferred from signature: *Tilden Rent-a-Car Co v Clendenning* (1978) 83 DLR (3d) 400, Ont CA (car rental agreement signed at airport 'in a hurried, informal manner'; purported to incorporate terms on reverse which were 'unusual and onerous terms which are inconsistent with the true object of the contract'. Held: terms not incorporated).

11 See paras 668, 670 ante. Cf deeds delivered in escrow, as to which see para 685 note 3 ante.

12 *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805, [1951] 1 All ER 631, CA; *Saunders v Ford Motor Co Ltd* [1970] 1 Lloyd's Rep 379; but see *JH Saphir (Merchants) Ltd v AL Zissimos* [1960] 1 Lloyd's Rep 490; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 812 et seq.

13 See para 687 post.

14 As to incapacity, undue influence, drunkenness and insanity see paras 630 ante, 709 et seq post.

15 *Sandys v Stanton* (1952) 160 EG 537; and see para 708 note 7 post.

16 *R Simon & Co Ltd v Peder P Hedegaard AS* [1955] 1 Lloyd's Rep 299 (gummed slip added to contract); and see para 1056 post.

17 *Grogan v Robin Meredith Plant Hire* (1996) 15 Tr LR 371 at 375, CA, per Auld LJ (contractor signed weekly time sheets, which purported to incorporate CPA contractual terms; this relied on to vary prior oral contract. Held: time sheets essentially administrative documents. They 'did not have the clarity of meaning and purpose required to effect a variation incorporating them into the contract'). For the application of this rule to the incorporation of exclusion clauses see para 802 post; and as to the variation of contracts see generally para 1019 post.

18 Ie under the Unfair Contract Terms Act 1977 s 3: see para 823 post.

19 Ie under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4: see paras 793-794 post.

## UPDATE

### 686 Acceptance by signature

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 5--See *Korda v ITF Ltd (t/a International Tennis Federation)* (1999) Times, 4 February (signature of applicant to enter a competition, agreeing to abide by the rules); reversed on appeal on different grounds, (1999) Independent, 21 April, CA.

NOTE 6--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(4) WRITTEN CONTRACTS AND WRITTEN TERMS/(ii) Signed Contracts/687. Non est factum.

### **687. Non est factum.**

The ancient common law defence of non est factum<sup>1</sup> originally appeared as a defence by one who could not read (whether through blindness or illiteracy) to a claim based on a promise made under seal<sup>2</sup>; but, by the nineteenth century, it had been extended to persons who could read and to all kinds of signed contracts<sup>3</sup>. The basis of the defence is that the signatory is mistaken as to the nature of the transaction. Now the general rule is that a person is estopped by his signature thereon from denying his consent to be bound by the provisions contained in that deed<sup>4</sup> or other agreement<sup>5</sup>. Where, however, the plea of non est factum is available, the promises contained in the document are completely void as against the signatory entitled to plead the defence, no matter into whose hands that document may come<sup>6</sup>. The reason is said to be that the mind of the signatory did not accompany his signature, so that the mistake renders his consent, as represented by his signature, a complete nullity<sup>7</sup>.

In most of the cases in which non est factum has been successfully pleaded, the mistake has been induced by fraud; but the presence of fraud is probably not a necessary factor<sup>8</sup>. At one time a distinction was made between mistakes as to the character and class of the transaction on the one hand and the contents of the document on the other<sup>9</sup> but this differentiation has been rejected by the House of Lords in a case which established the following propositions<sup>10</sup>:

- 52 (1) the plea can only rarely be established by a person of full age and capacity; and, although it is not confined to blind or illiterate persons, any extension in the scope of the plea will be kept within narrow limits<sup>11</sup>;
- 53 (2) the burden of establishing the plea falls on the signatory seeking to disown the document<sup>12</sup>; and he must show that, in signing the document, he acted with reasonable care<sup>13</sup>. Carelessness which would preclude him from pleading non est factum is based on the principle that no person can take advantage of his own wrong, and is not an instance of negligence operating by way of estoppel<sup>14</sup>;
- 54 (3) in relation to the extent and nature of the mistake relied upon to set up the plea, the distinction formerly drawn between the character and class and the contents of a document<sup>15</sup> is unsatisfactory<sup>16</sup>. For the plea to succeed, it is essential to show that there is as regards the transaction a radical or fundamental distinction between what the person seeking to set up the plea actually signed and what he thought he was signing<sup>17</sup>;
- 55 (4) the same principles apply to the signature of a document in blank as apply to the signing of a completed document<sup>18</sup>.

The plea of non est factum is normally made where a third party is involved<sup>19</sup>: either a third party fraudulently induces one contracting party to sign a contract, the other contracting party being unaware of the fraud<sup>20</sup>; or the other contracting party fraudulently induces the signature on a document relied on by a third party<sup>21</sup>. Where no third party is involved, it has been said that, instead of pleading non est factum, it may be preferable to proceed on some other ground<sup>22</sup>.

1 It was not made by him and so is not his deed.

2 See eg *Thoroughgood's Case* (1584) 2 Co Rep 9a (illiterate); and as to contracts made by deed see paras 617, 685 ante.

3 See eg *Foster v Mackinnon* (1869) LR 4 CP 704 (elderly signatory induced to indorse a bill of exchange by false representation that it a guarantee).

4 See *Lady Naas v Westminster Bank Ltd* [1940] AC 366 at 374, 375, [1940] 1 All ER 485 at 489, HL; and see para 685 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 57.

5 See eg *O'Connor Real Estate Ltd v Flynn* (1969) 3 DLR (3d) 345 (NS). As to mistakes as to terms see para 708 post.

6 See eg *Foster v Mackinnon* (1869) LR 4 CP 704, cited in note 3 supra.

7 *Foster v Mackinnon* (1869) LR 4 CP 704 at 711; *Saunders v Anglia Building Society* [1971] AC 1004 at 1026, [1970] 3 All ER 961 at 972, HL, per Lord Wilberforce; and see the similar remarks when the case was before the Court of Appeal sub nom *Gallie v Lee* [1969] 2 Ch 17 at 30, [1969] 1 All ER 1062 at 1066, CA, per Lord Denning MR.

8 *Foster v Mackinnon* (1869) LR 4 CP 704 at 711, obiter per Byles J: 'it is invalid not merely on the grounds of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended'. See also *Bank of Ireland v M'Manamy* [1916] 2 IR 161. Cf *Hasham v Zenab* [1960] AC 316 at 335, PC, per Lord Tucker.

9 When the defence of non est factum was extended to simple signed contracts, the court sought to limit the scope of its application in two ways: (1) by insisting that the signatory must have made a mistake (*Hunter v Walters* (1871) 7 Ch App 75; *Gillman v Gillman* (1946) 174 LT 272; *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1019 and 966 per Lord Hodson, at 1025-1026 and 971-972 per Lord Wilberforce and at 1035 and 973 per Lord Pearson); (2) by allowing the plea only where there was a mistake as to the character and class of the transaction (see eg *Foster v Mackinnon* (1869) LR 4 CP 704 (see note 3 supra); *Lewis v Clay* (1897) 67 LQB 224; *Bagot v Chapman* [1907] 2 Ch 222; *Muskham Finance Ltd v Howard* [1963] 1 QB 904, [1963] 1 All ER 81, CA; *Marks v Imperial Life Assurance Co of Canada* [1949] OR 49, [1949] 1 DLR 613 (affd [1949] OR 564, [1949] 3 DLR 647, Ont CA); *Steams v Ratel* (1961) 29 DLR (2d) 718, BC CA); but where the mistake was merely as to the contents of the document, the plea was not available (see eg *Howatson v Webb* [1908] 1 Ch 1, CA; *Blay v Pollard and Morris* [1930] 1 KB 628, CA; *Puffer v Mastorkis* [1967] 1 OR 61, 59 DLR (2d) 427 (Ont); *O'Connor Real Estate Ltd v Flynn* (1969) 3 DLR (3d) 345 (NS)) though the deed or agreement might be set aside as between the immediate parties to it. As to rescission for misrepresentation or mistake see paras 987-988 respectively post.

10 *Saunders v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL (elderly lady signed document of sale of her house to a third party, believing that it was a deed of gift to her nephew; third party mortgaged the house).

11 *Saunders v Anglia Building Society* [1971] AC 1004 at 1015-1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1020 and 966-967 per Viscount Dilhorne, at 1025-1027 and 971-973 per Lord Wilberforce and at 1034 and 978-979 per Lord Pearson. In particular, their Lordships thought the plea would not be available to one who signed a document without informing himself of its meaning.

12 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1019 and 966 per Lord Hodson, at 1023 and 969 per Viscount Dilhorne, at 1027 and 973 per Lord Wilberforce and at 1034 and 979 per Lord Pearson. The House of Lords thus overruled *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489, CA, where it had been held that negligence was only material where the document actually signed was a negotiable instrument.

13 The signatory failed to discharge that onus in the following cases: *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; *Norwich and Peterborough Building Society v Steed (No 2)* [1993] Ch 116, [1993] 1 All ER 330, CA. See also *Marvco Color Research Ltd v Harris* [1980-84] LRC (Comm) 370, Can SC; *Maeaniani v Saemela* [1980-84] LRC (Comm) 339, Sol Islands.

14 *Saunders v Anglia Building Society* [1971] AC 1004 at 1015, [1970] 3 All ER 961 at 962, HL, per Lord Reid, at 1019 and 966 per Lord Hodson, at 1020 and 966-967 per Viscount Dilhorne and at 1036-1038 and 981-982 per Lord Pearson. See also *Landzeal Group Ltd v Kyne* [1990] 3 NZLR 576.

15 See note 9 supra.

16 *Saunders v Anglia Building Society* [1971] AC 1004 at 1017, [1970] 3 All ER 961 at 964, HL, per Lord Reid, at 1018 and 965 per Lord Hodson, at 1022 and 969 per Viscount Dilhorne, at 1025 and 971 per Lord Wilberforce and at 1039 and 983 per Lord Pearson.

17 *Saunders v Anglia Building Society* [1971] AC 1004 at 1017, [1970] 3 All ER 961 at 964, HL, per Lord Reid, at 1019 and 965 per Lord Hodson, at 1021-1022 and 967-969 per Viscount Dilhorne, at 1026 and 972 per Lord Wilberforce and at 1034, 1039 and 979, 983 per Lord Pearson.

18 *United Dominions Trust Ltd v Western* [1976] QB 513, [1975] 3 All ER 1017, CA (hirer signed loan agreement in blank, believing it to be a hire-purchase agreement. Hirer's plea of non est factum rejected; not following *Campbell Discount Co Ltd v Gall* [1961] 1 QB 431, [1961] 2 All ER 104, CA).

19 See note 8 supra.

20 See eg *United Dominion Trust Ltd v Western* [1976] QB 513, [1975] 3 All ER 1017, CA.

21 See eg *Saunders v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 61, HL.

22 *Lloyds Bank plc v Waterhouse* [1993] 2 FLR 97, (1990) 10 Tr LR 161, CA (the majority said that the matter should be dealt with as a misrepresentation; Sir Edward Eveleigh that mistake was appropriate). See also *Petelin v Cullen* (1975) 132 CLR 355, Aust HC.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(4) WRITTEN CONTRACTS AND WRITTEN TERMS/(iii) Written Terms in other Contracts/688. General rule.

### **(iii) Written Terms in other Contracts**

#### **688. General rule.**

Even where the assent of the parties to an agreement is signified in some manner other than by signature on a document containing or referring to its terms<sup>1</sup>, it is still possible for the terms contained in a document or documents to become part of the agreement between those parties<sup>2</sup>; for instance, industry or trade association terms<sup>3</sup>. That document or documents may even be the terms of another contract between the parties<sup>4</sup>, or of a draft agreement between them<sup>5</sup>, or of a contract between one of them and a third party<sup>6</sup>. All that is required is a clear intention on the part of all parties to the agreement that the terms contained in that one or more documents<sup>7</sup> be incorporated into their agreement<sup>8</sup>.

Whether the terms contained or referred to in the document or documents be virtually the whole of the agreement<sup>9</sup> or just a small part of it<sup>10</sup>, the test is the same: the courts insist that the party proffering the document as part of the agreement (the proferens) gives reasonable notice to all the other parties to the agreement that the terms contained in the document are intended by him to be incorporated into the agreement<sup>11</sup>. He may do this expressly, by giving actual notice of the written terms and his intention to the other parties<sup>12</sup>; or he may do so by implication<sup>13</sup>. This mechanism may even be used to incorporate subsequently settled terms<sup>14</sup>.

Furthermore, even where written terms have been so incorporated into an agreement, the court may accept extrinsic evidence to show that the document containing those terms does not represent the whole of the agreement between the parties<sup>15</sup>.

1 See paras 685-687 ante.

2 As to the interpretation of that document see para 772 et seq post.

3 See eg *Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd* [1975] 2 All ER 549, [1975] 1 WLR 1281, CA (RIBA, 1965 Edition); *Shearson Lehman Hutton Inc v MacLaine, Watson & Co Ltd* [1989] 2 Lloyd's Rep 570 (LME conditions; as to the problems created by LME changes of conditions see *Shearson Lehman Hutton Inc v MacLaine, Watson & Co Ltd* supra at 625-632 per Webster J). As to standard form contracts see generally para 771 post.

4 See eg *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL; *Saphena Computing Ltd v Allied Collection Agencies Ltd* [1995] FSR 616, CA; and see para 801 post.

5 Eg provisional agreements: see para 669 ante.

6 See eg *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co* [1924] AC 522, HL; *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC.

7 Where each party purports to contract according to his own standard conditions, the second set of conditions proffered are a counter-offer: see para 664 ante. As to standard form contracts see para 771 post; as to counter-offers see para 663 ante. Especially where the agreement has been wholly or partially executed, the courts will usually be able to find a contract (see para 675 note 3 ante); but it is conceivable that in the circumstances described the parties may never reach agreement at all (see paras 631 note 7 ante, 701 post).

8 See eg *MacLeod Ross & Co Ltd v Compagnie d'Assurances Generales L'Helvetia of St Gall* [1952] 1 All ER 331, CA; *Sidney Kaye, Eric Firmin & Partners (a firm) v Bronesky* (1973) 226 Estates Gazette 1395, CA; *Oakbank Oil Co v Lowe and Stewart* 1918 SC 54, HL; *Brown & Gracie Ltd v FW Green & Co Pty Ltd* [1960] 1 Lloyd's Rep 289, HL. The issue usually arises in the context of implied incorporation, as to which see para 689 post.

Compare *Clement v Gibbs (t/a LJ Gibbs & Son)* [1996] CLY 1209, CA (architect's drawing not a contractual document, but only to give an idea what was wanted).

9 See eg *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA (ticket incorporating virtually all the terms of the contract either expressly or by reference).

10 See eg *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805, [1951] 1 All ER 631, CA (ticket incorporating an exclusion clause into an otherwise oral contract).

11 Quaere whether the test would be so strict where the written terms are for the benefit of a party other than the one proffering them.

12 See para 802 note 2 post; and also the cases cited in para 752 note 9 post.

13 See para 689 post.

14 *Shearson Lehman Hutton Inc v MacLaine, Watson & Co Ltd* [1989] 2 Lloyd's Rep 570 (subsequent changes in trade association terms); *Crittall Windows Ltd v TJ Evers Ltd* (1997) 54 ConLR 66 (subsequent architect's drawings).

15 See para 690-700 post.

## **UPDATE**

### **688 General rule**

NOTE 8--See also *Photolibrary Group (t/a Garden Picture Library) v Burda Senator Verlag GmbH* [2008] EWHC 1343 (QB), [2008] 2 All ER (Comm) 881.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(4) WRITTEN CONTRACTS AND WRITTEN TERMS/(iii) Written Terms in other Contracts/689. Incorporation by implication.

### **689. Incorporation by implication.**

It is quite competent for the parties to an agreement to incorporate by implication into that agreement terms contained in an unsigned document<sup>1</sup>. Incorporation of terms by implication may occur, for example, as follows: where there is a common usage in the trade to utilise a particular standard form<sup>2</sup>; or where there is a course of dealings between the parties to use a standard form<sup>3</sup>. Thus, where the standard form is in common use the fact that the parties are contracting together for the first time will not affect implication<sup>4</sup>; but there will be no such implication where the standard form is not in common use, but was introduced in the course of dealings between the parties<sup>5</sup>. Questions have arisen, for example in contracts of carriage<sup>6</sup>, whether printed conditions will be imported into contracts although they have not been specifically agreed upon by both parties<sup>7</sup>. A party accepting from the other party, or his agent, a ticket or other similar document containing such conditions, or references to such conditions, will prima facie<sup>8</sup> only be deemed to have contracted subject thereto provided that (1) the ticket, or other document, is a contractual document<sup>9</sup>; (2) reasonable steps have been taken to bring the conditions to his notice<sup>10</sup>, even though a circuitous route may be necessary to discover those terms<sup>11</sup>; and (3) reasonable notice has been given before the contract was made<sup>12</sup>.

It is a question of fact whether timely reasonable steps have been taken to bring conditions to the notice of the accepting party, but it is a question of law whether there is sufficient evidence on which such a finding of fact can be made<sup>13</sup>. Thus, it has been said that written terms would not be incorporated from a non-contractual document, that is, a mere receipt, which it would be quite reasonable that the party receiving it should assume contained no conditions and should put in his pocket unread<sup>14</sup>. The following documents have been regarded as non-contractual receipts: a ticket for a deck chair<sup>15</sup>; a cheque book<sup>16</sup>; a parking ticket issued by an automatic machine<sup>17</sup>.

In particular, if the unsigned writing which it is sought to incorporate into the contract contains a particularly unusual or onerous term, the more unreasonable the term, the greater the notice which must be given of it<sup>18</sup>. Thus, it has been held that the supplier by way of hire of photographic transparencies had given insufficient notice to incorporate into his supply contract a term that, if the goods were not returned within 14 days a greatly increased fee was payable<sup>19</sup>; and the issue of reasonable notice is further considered in the context of exclusion clauses<sup>20</sup>. There may be statutory means of avoiding even incorporated unreasonable clauses in consumer supply contracts<sup>21</sup> or standard form contracts<sup>22</sup>.

1 See para 688 ante; and as to implied terms generally see para 778 et seq post. As to standard form contracts see para 771 post; and as to implication by trade usage or course of dealings see note 3 infra; and para 780 post.

2 Even if that usage was not referred to at the time of contracting: *British Crane Hire Corpn Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA. See also *Chevron International Oil Co Ltd v A/S Sea Team* [1983] 2 Lloyd's Rep 356.

3 *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA; *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd* [1964] 2 Lloyd's Rep 227 (affd on other grounds sub nom *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL); *Transmotors Ltd v Robertson Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224; *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; *SIAT di dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep 53, CA; *McCrone v Boots Farm Sales Ltd* 1981

SLT 103; *Johnson Matthey Bankers Ltd v State Trading Corpn of India Ltd* [1984] 1 Lloyd's Rep 427; *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427, CA. But cf *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL. As to course of dealings see further paras 780, 801 post.

4 See *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA.

5 See *Hollier v Rambler Motors (AmC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA.

6 See generally CARRIAGE AND CARRIERS vol 7 (2008) PARA 71 et seq.

7 The question usually arises in relation to exclusion clauses, as to which see para 797 et seq post.

8 As most of the cases have arisen in the context of exclusion clauses, fuller discussion of these criteria for implied incorporation will be found in para 802 post. For some other ways in which exclusion clauses have been incorporated into contracts see para 801 post.

9 See eg (1) ship passenger ticket (*Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, HL; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450); (2) railway passenger ticket (*Thompson v London, Midland and Scottish Rly* [1930] 1 KB 41, CA); (3) receipt for deposited goods (*Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442).

10 *Parker v South Eastern Rly* (1877) 2 CPD 416, CA; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, HL; and see further para 802 post. See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 74. As to conditions purporting to exempt a party from liability for negligence see para 806 post.

11 *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA (on face of ticket said 'For Conditions see back'; on back, 'Issued subject to the conditions and regulations in the company's timetables ... and excursion and other bills'; on excursion bill, 'Excursion tickets are issued subject to the notices and conditions shown in the company's current timetable'; timetables contained relevant exclusion clause); and see para 802 note 7 post.

12 *Olley v Marlborough Court Ltd* [1949] 1 KB 532, [1949] 1 All ER 127, CA (contract made when guest signed hotel register; only on afterwards entering her room did she see exclusion clause); *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA (ticket proffered by automatic machine); *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70 (contract for carriage of passenger by sea made through travel agent; subsequently delivered ticket contained exclusion clause); *Dillon v Baltic Shipping Co, The Mikhail Lermontov* [1991] 2 Lloyd's Rep 155, NSW SC (cruise-liner contract made before ticket issued). See also *Grayston Plant Ltd v Plean Precast Ltd* 1976 SC 206, IH (reference to standard terms of trade to which hirers did not belong and with which they were unfamiliar; no copy supplied. Held: owners had not given reasonable notice of terms).

13 *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA; *Watkins v Rymill* (1883) 10 QBD 178, DC; *Sugar v London, Midland and Scottish Rly Co* [1941] 1 All ER 172.

14 *Parker v South Eastern Rly* (1877) 2 CPD 416 at 422, CA, per Mellish LJ.

15 *Chapleton v Barry UDC* [1940] 1 KB 532, [1940] 1 All ER 356, CA. See also *Taylor v Glasgow Corp* 1952 SC 440 (ticket handed to customer at public bath house). The subsequent conduct of the parties is not, however, admissible to interpret the contract: see para 622 text to note 23 ante.

16 *Burnett v Westminster Bank Ltd* [1966] 1 QB 742, [1965] 3 All ER 81.

17 *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA.

18 See *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 at 125, [1956] 1 WLR 461 at 466, CA, per Denning LJ who added: 'Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient'. As to the application of this rule to exclusion clauses see para 802 head (5) post. See also *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 173, [1971] 1 All ER 686 at 692, CA, per Megaw LJ; *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552 at 567, [1976] 1 WLR 676 at 693, CA, per Megaw LJ; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69 at 79, [1977] 3 All ER 498 at 503, CA, per Lord Denning MR.

19 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, [1988] 1 All ER 348, CA (after the fortnight, a daily 'holding fee' charged. But see now the Unfair Contract Terms Act 1977 s 3; and para 823 post). See also *Dillon v Baltic Shipping Co* [1991] 2 Lloyd's Rep 155, NSW SC.

20 See para 802 post.

21 le under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (see para 790 et seq post); and the Unfair Contract Terms Act 1977 s 3 (see para 823 post).

22 See *ibid* s 3(1); and para 823 post.

## **UPDATE**

### **689 Incorporation by implication**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 12--See *O'Brien v MGN Ltd* [2001] All ER (D) 01 (Aug), CA.

NOTE 18--See also *Kaye v Nu Skin UK Ltd* [2009] EWHC 3509 (Ch), [2010] All ER (D) 177 (Feb).

NOTE 19--*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, cited, applied in *Montgomery Litho Ltd v Maxwell* 1999 SLT 1431, Inner House.

NOTE 21--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(4) WRITTEN CONTRACTS AND WRITTEN TERMS/(iii) Written Terms in other Contracts/690-700. Extrinsic evidence.

### **690-700. Extrinsic evidence.**

Where expressly or by implication written terms have been incorporated into an agreement<sup>1</sup>, the general rule (the 'parol evidence rule') is that extrinsic evidence may not be given to contradict or vary its effect<sup>2</sup>. Nevertheless, extrinsic evidence may be introduced<sup>3</sup> to show that the writing did not represent the whole bargain between the parties<sup>4</sup>. Whilst full treatment of those cases where extrinsic evidence will be admitted is to be found elsewhere in this work<sup>5</sup>, such evidence will be admitted in the following cases:

- 56 (1) to show whether there is a valid contract: thus, parol evidence may be admissible to show that an apparently binding written contract is not a valid contract: because, for instance, there was never any agreement between the parties<sup>6</sup>, as where a signature is void under the non est factum rule<sup>7</sup>; the written agreement was subject to a condition precedent<sup>8</sup>, or, in the case of a deed, was delivered in escrow<sup>9</sup>; the writing was not intended to give rise to contractual relations<sup>10</sup>, or is void for non-compliance with statute<sup>11</sup>; the document did not embody the previous agreement between the parties<sup>12</sup>; where the document is not a deed<sup>13</sup>, whether or not it is supported by consideration<sup>14</sup>; and the date on which a written agreement was made<sup>15</sup>;
- 57 (2) to show the true nature of an apparently valid contract: thus, parol evidence may be admissible to show the true nature of the agreement between the parties<sup>16</sup>; that the written form does not correspond with the prior oral agreement between the parties<sup>17</sup>; that a purported party was only the agent of another<sup>18</sup>; that, after the written agreement was made<sup>19</sup>, it has been materially altered<sup>20</sup> or varied<sup>21</sup>; that a written agreement should be read in the light of usage<sup>22</sup>, or is subject to a collateral contract<sup>23</sup> or is subject to an overriding oral undertaking<sup>24</sup>; or to cure uncertainty in a written document<sup>25</sup>, as in the case of latent ambiguity<sup>26</sup>, though not patent ambiguity<sup>27</sup>; or to release a joint debtor<sup>28</sup>;
- 58 (3) to show that an apparently valid contract has been invalidated by duress<sup>29</sup>, fraud<sup>30</sup>, illegality<sup>31</sup>, misrepresentation<sup>32</sup>, mistake<sup>33</sup> or frustration<sup>34</sup>. Further the parol evidence rule is not enforced where a court is asked to grant (equitable) discretionary remedies, such as rectification or rescission on grounds of mistake<sup>35</sup>, or specific performance<sup>36</sup>.

1 See paras 688-689 ante.

2 *Davis v Symonds* (1787) 1 Cox Eq Cas 402 at 404-405; *Williams v Jones* (1826) 5 B & C 108; see para 622 ante; and see further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185.

3 As to the extent of that evidence see para 772 note 7 post.

4 *Stones v Dowler* (1860) 29 LJ Ex 122, Ex Ch; *Reuss v Picksley* (1866) LR 1 Exch 342, Ex Ch; *Stewart v Eddowes* (1874) LR 9 CP 311; *Moore v Garwood* (1849) 4 Exch 681, Ex Ch; *Bolckow v Seymour* (1864) 17 CBNS 107; *Howden Bros Ltd v Ulster Bank Ltd* [1924] 1 IR 117; *Hutton v Watling* [1948] Ch 398, [1948] 1 All ER 803, CA; *Gold v Patman and Fotheringham Ltd* [1958] 2 All ER 497, [1958] 1 WLR 697, CA; *London Weekend Television Ltd v Paris* (1969) 113 Sol Jo 222 (rectification proceedings, as to which see MISTAKE vol 77 (2010) PARA 57 et seq).

5 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 185-213. As to the admission of extrinsic evidence in the interpretation of contracts see para 772 et seq post.

6 *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564; and for the requirement of consensus see para 631 ante.

7 As to non est factum see para 687 ante.

8 *Pym v Campbell* (1856) 6 E & B 370. As to conditions precedent see para 670 ante.

9 *London Freehold and Leasehold Property Co v Baron Suffield* [1897] 2 Ch 608 at 622, CA, per Lindley MR; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 37, 38.

10 *Bowes v Foster* (1858) 2 H & N 779; *Rogers v Hadley* (1863) 2 H & C 227; *Pattle v Hornibrook* [1897] 1 Ch 25; *Orion Insurance Co plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239, CA; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 190. As to intention to create legal relations see para 718 post.

11 *Lockett v Nicklin* (1848) 2 Exch 93; *Campbell Discount Co Ltd v Gall* [1961] 1 QB 431, [1961] 2 All ER 104, CA, not followed in *United Dominions Trust Ltd v Western* [1976] QB 513, [1975] 3 All ER 1017, CA.

12 The parol evidence rule is confined to documentary contracts and does not apply to other writing: see eg *Holding v Elliott* (1860) 5 H & N 117 (invoice); *Guardian Ocean Cargoes Ltd v Banco do Brasil SA* [1991] 2 Lloyd's Rep 68 (payment instruction); *SS Ardennes (Owner of Cargo) v SS Ardennes (Owners)* [1951] 1 KB 55, [1950] 2 All ER 517 (bill of lading); and see DEEDS AND OTHER INSTRUMENTS.

13 As to deeds see para 621 ante.

14 *Equitable Fire and Accident Office v Ching* [1907] AC 96, PC (no consideration); and see para 727 note 1 post; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 194.

15 *Jayne v Hughes* (1854) 10 Exch 430 (date of delivery of deed); *Armfield v Allport* (1857) 6 WR 63 (date of execution of written instrument); *Davis v Jones* (1856) 17 CB 625 (no date); and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 193.

16 *Re Duke of Marlborough, Davis v Whitehead* [1894] 2 Ch 133 (conveyance shown to be a mortgage); *Maas v Pepper* [1905] AC 102, HL (sale a secured loan); *Polisky v S and A Services Ltd, S and A Services Ltd v Polisky* [1951] 1 All ER 1062n, CA (hire-purchase agreement a bill of sale); *Sun Alliance Pensions Life and Investment Services Ltd v Webster* [1991] 2 Lloyd's Rep 410 (principal debtor shown to be a surety); and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 120.

17 If the written form does not amount to a variation of the contract (see eg *Penarth Dock Engineering Co Ltd v Pound* [1963] 1 Lloyd's Rep 359; *Northern Sales Ltd v The Giancarlo Zeta* [1966] 2 Lloyd's Rep 317 (BC)) it may be rectified to correspond with the oral agreement (see eg *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; para 896 post; and MISTAKE vol 77 (2010) PARA 57). As to variation of contract see note 21 infra.

18 So as to pass the benefit and burden of a contract to an undisclosed principal: see *Bateman v Phillips* (1812) 15 East 272. Contra where the parol evidence would contradict a statement in the document that he is the real principal: *Humble v Hunter* (1848) 12 QB 310 (described in charterparty as 'owner'); and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 186.

19 As to the date of making a written agreement see note 15 supra.

20 *Davidson v Cooper* (1844) 13 M & W 343 (guarantee); *Stewart v Eddowes* (1874) LR 9 CP 311. It is otherwise if the alteration is with the agreement of both parties so that it amounts to a variation (see note 21 infra); or where the document is altered to correct a mistake in the written statement of a prior oral contract (see note 33 infra).

21 *Morris v Baron & Co Ltd* [1918] AC 1, HL; and see DEEDS AND OTHER INSTRUMENTS. This rule applies both to subsequent discharge and variation, as to which see para 1013 et seq post.

22 When the contract is silent on the matter: *Hutton v Warren* (1836) 1 M & W 466 (local custom); *Leidemann v Schultz* (1853) 14 CB 38 (trade usage); and see generally CUSTOM AND USAGE. It is otherwise where the custom or usage contradicts the express words of the document: *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, HL.

23 *Webster v Higgins* [1948] 2 All ER 127, CA; and see DEEDS AND OTHER INSTRUMENTS.

24 *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733; *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA; *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA; *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA; *Metalferr Corp v Pan Ocean Shipping Co Ltd* [1997] 2 CL 32.

25 See the cases cited in note 4 supra; and para 772 note 7 post. Sometimes such uncertainty may be removable by election of one of the contracting parties: see *Mervyn v Lyds* (1553) 1 Dyer 90a; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 214-216.

26 A latent ambiguity (or equivocation) is one which does not appear on the face of the contract. For the admission of extrinsic evidence in this situation see *Sweeting v Fowler* (1815) 1 Stark 106; *Stebbing v Spicer* (1849) 8 CB 827; *Raffles v Wichelhaus* (1864) 2 H & C 906; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 69.

27 Whilst uncertainty might be removable by election (see note 25 supra), some of the older cases suggest that parol evidence is not admissible to cure a patent ambiguity, ie one which appears on the face of the contract: *Colpoys v Colpoys* (1822) Jac 451; *Great Western Rly Co and Midland Rly Co v Bristol Corp* (1918) 87 LJ Ch 414 at 429, HL, per Lord Wrenbury; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 170.

28 See para 1089 note 4 post.

29 *Williams v Bayley* (1866) LR 1 HL 200. As to duress see paras 710-711 post.

30 *Pickering v Dowson* (1813) 4 Taunt 779; *Dobell v Stevens* (1825) 3 B & C 623.

31 *Collins v Blantern* (1767) 2 Wils 347; *Doe d Chandler v Ford* (1835) 3 A & E 649; *Madell v Thomas & Co* [1891] 1 QB 230, CA; and see para 838 note 8 post.

32 *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805, [1951] 1 All ER 631, CA; and see para 802 note 15 post.

33 *Clowes v Higginson* (1813) 1 Ves & B 524; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 188.

34 See para 902 note 1 post.

35 *Baker v Paine* (1750) 1 Ves Sen 456; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 189-190; MISTAKE.

36 *Martin v Pyecroft* (1852) 2 De GM & G 785; *Webster v Cecil* (1861) 30 Beav 62; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 189; SPECIFIC PERFORMANCE vol 44(1) (Reissue) para 857.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(5) CONSENT/(i) Mutual Assent and Estoppel/701. Mutual assent.

## **(5) CONSENT**

### **(i) Mutual Assent and Estoppel**

#### **701. Mutual assent.**

It follows from what has been stated under the heading of offer and acceptance that it is essential to the validity of a contract that the contracting parties should either have assented, or be taken to have assented, to the same thing in the same sense; or, as it is sometimes put, that there should be consensus ad idem<sup>1</sup>. A party may be taken to have assented if he has so conducted himself as to be estopped from denying that he has so assented<sup>2</sup>.

Where, on the consideration of the evidence in the light of these principles, it is impossible to show unequivocally that the parties assented to the same thing in the same sense, then the alleged contract may be vitiated by mistake<sup>3</sup>.

A contract, although assented to by all parties, may be voidable by one of them on the ground that his consent was obtained by duress<sup>4</sup>, undue influence<sup>5</sup>, fraud or innocent misrepresentation, or whilst he was drunk<sup>6</sup>. The subjects of misrepresentation and fraud are treated elsewhere in this work<sup>7</sup>. In certain classes of contracts, uberrima fides and full disclosure are required<sup>8</sup>.

1 See paras 631, 688 ante.

2 See para 702 post.

3 See para 703 et seq post.

4 See paras 710-711 post.

5 See para 712 et seq post.

6 See para 717 post.

7 See EQUITY; MISREPRESENTATION AND FRAUD.

8 The principle is applied to the greatest extent in contracts of insurance (see INSURANCE) and partnership (see PARTNERSHIP), and contracts between persons between whom a fiduciary relationship exists, such as principal and agent, solicitor and client, trustee and beneficiary etc (see generally AGENCY vol 1 (2008) PARA 71 et seq; LEGAL PROFESSIONS; TRUSTS), and to a more limited extent in contracts of suretyship (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1036) and family arrangements (see *Wales v Wadham* [1977] 2 All ER 125, [1977] 1 WLR 199, CA). The effect of non-disclosure where there is a duty to disclose is to render the contract voidable at the option of the party to whom the duty was owing.

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## 702. Estoppel.

Where there is a dispute between the parties as to the terms of an offer and a party has so conducted himself that a reasonable person would believe that he was assenting to the terms as proposed by the other party, the person who has so conducted himself, whatever his real intention may have been, is bound by the contract as if he had intended to agree to the other party's terms<sup>1</sup>. A person will not in general be permitted to deny his assent to a contract where he has been guilty of carelessness and has thereby misled the other party, and induced him to believe that he assented<sup>2</sup>, as where he signed a document in blank<sup>3</sup>. Where a person (P) clothes another (A) with the appearance of authority to contract on behalf of P with a third party, P will be estopped from denying A's authority to contract on his behalf<sup>4</sup>. Whilst the courts frequently describe the above-mentioned rules in terms of 'estoppel', it may be that they are not true cases of estoppel<sup>5</sup>, because the representor may be bound by acceptance of any such unintended offer even before the representee acts upon it<sup>6</sup>.

The above-mentioned 'estoppel' creating a contract should be distinguished from the situation where there is already an existing contract and, without creating a new contract of variation<sup>7</sup>, one party represents that he will not enforce his contractual rights and may thereby become 'equitably estopped' from relying on those rights<sup>8</sup>.

1 *Smith v Hughes* (1871) LR 6 QB 597 at 607 per Blackburn J; *Freeman v Cooke* (1848) 2 Exch 654; *Caledonian Rly Co v Stein & Co Ltd* 1919 SC 324 (acceptance of increased charges for railway services); *Sullivan v Constable* (1932) 48 TLR 369, CA; *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA; *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341 (bill of lading incorrectly shown as clean); cf *Norfolk County Council v Secretary of State for the Environment* [1973] 3 All ER 673, [1973] 1 WLR 1400, DC (no estoppel as, though statement had been acted upon, no detriment had been suffered). See also *Wood v Scarth* (1858) 1 F & F 293; *Scott v Littledale* (1858) 8 E & B 815; *Weatherby v Banham* (1832) 5 C & P 228; *Fairline Shipping Corp v Adamson* [1975] QB 180 at 188, [1974] 2 All ER 967 at 974; *Sea Calm Shipping Co SA v Chantiers Navals de L'Esterel SA, The Uhenbels* [1986] 2 Lloyd's Rep 294. Cf *Lee v Ah Gee* [1920] VLR 278 (Vict) (Chinese man not bound by his signed agreement as it should have been clear he did not understand what he was doing). See also ESTOPPEL; MISTAKE.

2 *Van Praagh v Everidge* [1902] 2 Ch 266 (revsd on other grounds [1903] 1 Ch 434, CA); *Tamplin v James* (1880) 15 ChD 215, CA; *Pacol Ltd v Trade Lines Ltd* [1982] Com LR 92, [1982] 1 Lloyd's Rep 456. Where a party has signed a contract under a misapprehension as to the essential nature of the transaction, it appears that he may be 'estopped' by negligence from pleading the defence of non est factum (see para 687 note 14 ante); but as to documents signed in blank see para 708 post. Cf *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564 (mistake by bidder at auction as to subject matter of sale, induced by misleading catalogue, so no estoppel).

3 See para 708 post.

4 *United Bank of Kuwait Ltd v Hammoud, City Trust Ltd v Levy* [1988] 3 All ER 418, [1988] 1 WLR 1051, CA (solicitor had no actual authority, but held out as having authority); *Swiss Air Transport Co Ltd v Palmer* [1976] 2 Lloyd's Rep 604 (agent represented as having more authority than actually given); *North West Leicestershire District Council v East Midlands Housing Association Ltd* [1981] 3 All ER 364, [1981] 1 WLR 1396, CA (no actual or ostensible authority; no estoppel); *Lease Management Services Ltd v Purnell Secretarial Services Ltd* [1994] CCLR 127, (1994) 13 Tr L 337, CA; and see generally AGENCY vol 1 (2008) PARA 25.

5 As to estoppel by representation see ESTOPPEL vol 16(2) (Reissue) para 1052 et seq.

6 *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* (1983) Times, 8 March, [1983] Com LR 158, CA.

7 See paras 1019-1024 post.



8 See paras 1030-1035 post; and, as regards a party who by conduct shows that he still regards a contract as subsisting, despite a breach by the other party, being precluded from resiling from that position where it would be inequitable for him to do so see paras 1010-1011, 1027 post. As regards waiver see paras 1025-1028 post.

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**(ii) Mistake**

**UPDATE**

**703-708 Mistake**

Material relating to this part has been revised and published under the title MISTAKE vol 77 (2010).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(5) CONSENT/ (iii) Duress, Undue Influence and Drunkenness/A. INTRODUCTION/709. In general.

### **(iii) Duress, Undue Influence and Drunkenness**

#### **A. INTRODUCTION**

##### **709. In general.**

A contract may be voidable by a party where he entered into it under duress<sup>1</sup>, undue influence<sup>2</sup> or whilst drunk<sup>3</sup> or insane<sup>4</sup>. The factors of duress, drunkenness and insanity were recognised by the old common law as overbearing the necessary free, or apparently free, consent of a party<sup>5</sup> and in the older cases were said to render a contract void<sup>6</sup>. However, this narrow common law view was supplemented by the courts of equity, which took a more generous view of what pressure would enable the court to interfere with a contract; and, particularly where there was a fiduciary relationship between the parties, equity would regard a contract as voidable<sup>7</sup> on grounds of undue influence.

Since the fusion of law and equity<sup>8</sup>, further grounds of intervention by the court have developed: duress of persons<sup>9</sup> has been extended to economic duress<sup>10</sup>; and undue influence has led to the doctrine of unconscionable bargains<sup>11</sup>. In the process, the courts seem to have moved<sup>12</sup> towards treating all the above-mentioned factors as usually only rendering a contract voidable<sup>13</sup>, rather than void<sup>14</sup>.

In so far as the basis of duress rests on pressure rather than an absence of consent, it is the nature of the pressure which becomes crucial. As some sorts of pressure are legitimate<sup>15</sup>, a distinction has to be drawn between legitimate and illegitimate pressure<sup>16</sup>. Further, as such illegitimate pressure merely renders a contract voidable, the contract may be ratified<sup>17</sup>; or, after the duress has ceased, the contract may be affirmed<sup>18</sup>. It is for consideration whether such illegitimate pressure might, after avoidance of the contract, also give rise to an action for damages in tort<sup>19</sup>.

1 Originally, duress consisted of actual or threatened violence or imprisonment: 1 Roll Abr 687; Coke 2 Inst 482. Cf (1) marriage under duress (see para 710 note 10 post); (2) insanity, where the authorities are conflicting (see para 649 ante). An alternative way of putting it may be that, by reason of the duress, there is no intention to create legal relations at all. As to the intention to create legal relations see para 718 et seq post; and as to duress see further paras 710-711 post.

2 See para 712 et seq post.

3 See para 717 post.

4 See para 649 ante.

5 As to consent see paras 701-702 ante.

6 As to void contracts see generally para 607 ante.

7 See para 704 next to note 18 ante.

8 See EQUITY vol 16(2) (Reissue) para 401 et seq.

9 See para 710 post.

10 See para 711 post.

11 See para 716 post.

12 Using the analogy with fraud and mistake: see, in the context of the criminal law (murder), *DPP for Northern Ireland v Lynch*[1975] AC 653 at 695, sub nom *Lynch v DPP for Northern Ireland*[1975] 1 All ER 913 at 938, HL, per Lord Simon.

13 See *DPP for Northern Ireland v Lynch*[1975] AC 653 at 670, sub nom *Lynch v DPP for Northern Ireland*[1975] 1 All ER 913 at 918, HL, per Lord Morris, at 680 and 926 per Lord Wilberforce, at 690-691 and 935 per Lord Simon and at 703 and 745 per Lord Kilbrandon; *Barton v Armstrong*[1976] AC 104 at 118, [1975] 2 All ER 465 at 474, PC, per Lord Cross.

14 Yet there are still some modern cases where it is said that duress makes a contract void: see *Barton v Armstrong*[1976] AC 104 at 121, [1975] 2 All ER 465 at 477, HL, per Lords Wilberforce and Simon (dissenting judgment); *Pao On v Lau Yiu Long*[1980] AC 614 at 636, [1979] 3 All ER 65 at 79, PC. See also the following economic duress cases: *Occidental Worldwide Investment Corp v Skibs A/S Avanti, The Sibotre* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron*[1979] QB 705, [1978] 3 All ER 1170; *Universe Tankships Inc of Monrovia v International Transport Workers' Federation*[1983] 1 AC 366, [1982] 2 All ER 67, HL.

15 Eg an offeror who declares that he will not soften his terms.

16 *Barton v Armstrong*[1976] AC 104 at 121, [1975] 2 All ER 465 at 476-477, HL, per Lords Wilberforce and Simon: 'in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor has no choice but to act'.

17 See para 710 note 16 post.

18 *Pao On v Lau Yiu Long*[1980] AC 614, [1979] 3 All ER 65, PC. As to the position for undue influence see para 712 post.

19 Ie in the tort of intimidation, upon which different views were expressed by Lords Diplock and Scarman in *Universe Tankships Inc of Monrovia v International Transport Workers' Federation*[1983] 1 AC 366 at 385, [1982] 2 All ER 67 at 76, HL, per Lord Diplock and at 400 and 88 per Lord Scarman.

A modern explanation of duress and the other factors considered in the text may be provided by the concept that the person exercising the illegitimate pressure acted in bad faith: see para 613 ante.

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## **B. DURESS**

### **710. Duress of persons.**

By duress of persons at common law is usually meant the compulsion under which a person acts through fear of personal suffering as from injury to the body<sup>1</sup> or from confinement, actual or threatened<sup>2</sup>. A threat<sup>3</sup> of a criminal prosecution for which there is sufficient ground is not such duress as will vitiate a contract made in consequence thereof<sup>4</sup>, provided that there is valuable consideration for the contract, and that there is no agreement to stifle the prosecution<sup>5</sup>. There is no duress simply because a party has to enter into a contract by reason of statutory compulsion<sup>6</sup>, or the fact that the other party is a monopoly supplier<sup>7</sup>. Moreover, as a general rule, a threat of civil proceedings or bankruptcy proceedings does not amount to duress<sup>8</sup>, whether there is good foundation for the proceedings or not<sup>9</sup>; but it may do so if it is intended and calculated, having regard to the circumstances, to cause terror in the particular case<sup>10</sup>. The question whether imprisonment or threatened imprisonment does or does not constitute duress depends upon whether the imprisonment is lawful or unlawful<sup>11</sup>.

A contract obtained by one party (A) by means of duress exercised by A over the other party (B)<sup>12</sup> is probably voidable by B<sup>13</sup>, even though he might have entered into the transaction even if the threat had not been uttered<sup>14</sup>: it is for A to prove that his threat has contributed nothing to B's decision to enter the contract<sup>15</sup>. However, if the contract is voluntarily acted upon by B, it will become binding on him<sup>16</sup>. The duress must be actually existing at the time of the making of the contract<sup>17</sup>; and the personal suffering may be that of B<sup>18</sup>, or his or her spouse<sup>19</sup> or near relative<sup>20</sup>; but duress of a stranger is more doubtful<sup>21</sup>.

In respect of duress, an action may lie in tort, as for assault or false imprisonment<sup>22</sup>; and property obtained by duress may be recoverable in tort<sup>23</sup> or restitution<sup>24</sup>.

1 *Friedeberg-Seeley v Klass* [1957] CLY 1482; *Barton v Armstrong*[1976] AC 104, [1975] 2 All ER 465, PC.

2 As to an example of duress from fear of confinement see *Cumming v Ince*(1847) 11 QB 112 (woman forcibly taken to lunatic asylum; but see note 3 infra).

3 The common law cases require the difficult distinction to be drawn between a threat which amounts to duress (see note 2 supra) and a mere warning, which does not: *Biffin v Bignell* (1862) 7 H & N 877 (warning that the probable consequences of her failure to agree would be her continued detention in a lunatic asylum). But equity does not require such a distinction, being able to treat both threats and warnings as undue influence: see *Williams v Bayley*(1866) LR 1 HL 200; and see para 712 post.

4 *Smith v Monteith* (1844) 13 M & W 427; *Kaufman v Gerson*[1904] 1 KB 591, CA; *Scolio Pty Ltd v Cote* [1992] Abr para 542, W Aust SC. In any event, it may amount to undue influence: *Mutual Finance Ltd v John Wetton & Sons Ltd*[1937] 2 KB 389, [1937] 2 All ER 657.

5 *Flower v Sadler*(1882) 10 QBD 572, CA (bills of exchange accepted under threat of prosecution for embezzlement; but see contra *Scolio Pty Ltd v Cote* [1992] Abr para 542, W Aust SC. Cf *R v Southerton* (1805) 6 East 126; *Williams v Bayley*(1866) LR 1 HL 200. As to the recovery of money so paid see note 24 infra. Nor is a threat of criminal prosecution undue influence: *Fisher & Co v Apollinaris Co*(1875) 10 Ch App 297; and see para 712 post. As to the illegality of an agreement to stifle a prosecution see para 848 post. As to what constitutes valuable consideration see para 735 et seq post.

6 *Byrnlea Property Investment Ltd v Ramsay*[1969] 2 QB 253, [1969] 2 All ER 311, CA; and see LANDLORD AND TENANT vol 27(3) (2006 Reissue) para 1428.

- 7 *Eric Gnapp Ltd v Petroleum Board*[1949] 1 All ER 980, CA. As to monopolies see generally para 866 post.
- 8 *Powell v Hoyland*(1851) 6 Exch 67; *Ex p Hall*(1882) 19 ChD 580, CA.
- 9 *Headfort v Brocket*[1966] IR 227 at 263.
- 10 *Scott v Sebright* (1886) 12 PD 21 (marriage under duress); *Ross Smith v Ross Smith*[1963] AC 280 at 348, [1962] 1 All ER 344 at 383, HL, obiter per Lord Guest; but for marriages after 31 July 1971 see the Matrimonial Causes Act 1973 s 12(c); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 331. See also *Barton v Armstrong*[1976] AC 104, [1975] 2 All ER 465, PC. A threat such as is mentioned in the text might, however, amount to the tort of malicious prosecution: see eg *Roy v Prior*[1971] AC 470, [1970] 2 All ER 729, HL; and TORT.
- 11 *Smith v Monteith* (1844) 13 M & W 427; *Brinkley v Hann* (1843) Drury temp Sug 175; and see the case cited in note 2 supra.
- 12 See *Brinkley v Hann* (1843) Drury temp Sug 175 (but see *Wilkinson v Stafford* (1789) 1 Ves 32 at 43); *Hinton v Hinton* (1755) 2 Ves Sen 631 at 635.
- 13 *Whelpdale's Case* (1604) 5 Co Rep 119a; *Friedeberg-Seeley v Klass* [1957] CLY 1482. At common law, the principle extends to contracts of marriage: see *Ford v Stier*[1896] P 1; *Scott v Sebright* (1868) 12 PD 21; *Cooper v Crane*[1891] P 369; and see note 10 supra. Cf *Kesarmal SO Letchman Das v Valliappa Chettiar SO Nagappa Chettiar* [1954] 1 WLR 380, PC. The older cases treat a contract made under duress as void: see para 709 ante.
- 14 *Barton v Armstrong*[1976] AC 104, [1975] 2 All ER 465, PC (held: deed void so far as B concerned).
- 15 *Barton v Armstrong*[1976] AC 104 at 118, [1975] 2 All ER 465 at 475, PC (applying the same rule as for contracts induced by misrepresentation; as to which see MISREPRESENTATION AND FRAUD).
- 16 *Ormes v Beadel* (1860) 2 De GF & J 333; *Findlay v Findlay* [1950] OWN 485, [1951] 1 DLR 185, Ont CA.
- 17 *Anon* (1708) 3 P Wms 293n.
- 18 *Barton v Armstrong*[1976] AC 104, [1975] 2 All ER 465, PC (threat by A to hire a criminal to kill B). See also *Welch v Cheesman* (1973) 229 Estates Gazette 99.
- 19 See 1 Roll Abr 687; cf *McClatchie v Haslam* (1891) 17 Cox CC 402, CA; *Kaufman v Gerson*[1904] 1 KB 591, CA (contract procured abroad).
- 20 See 1 Roll Abr 687; *Williams v Bayley*(1866) LR 1 HL 200 (duress of son); *Seear v Cohen* (1881) 45 LT 589 (duress of nephew); *Jones v Merionethshire Permanent Benefit Building Society*[1892] 1 Ch 173, CA (mother-in-law; brother-in-law).
- 21 Older cases suggest that duress of a stranger cannot be pleaded: *Huscombe v Standing* (1607) Cro Jac 187; and some cases suggest that a similar result can be reached on grounds of nudum pactum (*Pole v Harrobin* (1782) 9 East 416n; *Smith v Monteith* (1844) 13 M & W 427). However, other modern courts may take a different view: *Cumming v Ince*(1847) 11 QB 112 (see note 2 supra).
- 22 See eg *Friedeberg-Seeley v Klass*(1957) Times, 19 February (assault); *Kesarmal S/O Letchman Das v Valliappa Chettiar S/O Nagappa Chettiar* [1954] 1 WLR 380, PC.
- 23 See eg *Johnson v Simmonds*(1953) Times, 25 November (detinue or conversion).
- 24 Where money is obtained from a person as a condition of his release from arrest, a fraudulent use having been made of legal process, it can be recovered: *Duke de Cadaval v Collins* (1836) 4 Ad & El 858. See also *Earl of Northumberland's Case* (1583) 4 Leon 91 (wrongful detention); *Nicholls v Nicholls* (1737) 1 Atk 409 (arrest by due process); *Bromley v Norton* (1872) 27 LT 478 (arrest of woman for debt of husband). Where money was paid under a threat of proceedings to recover a statutory penalty, and it was subsequently held that the money so paid was not legally demandable, it was held that it could not be recovered as having been paid under duress, as it had been paid under a mistake of law, not of fact: *William Whiteley Ltd v R* (1909) 101 LT 741; *R v Beaver Lamb and Shearling Co Ltd* [1960] SCR 505, 23 DLR (2d) 513, Can SC.

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### 711. Economic duress.

The traditional view was that duress of goods, or the compulsion under which a person acts through fear for his property, was not a good ground for avoiding a contract<sup>1</sup>, even where the consideration was inadequate<sup>2</sup>. The possible hardship thereby involved was mitigated by the principle that, if goods were wrongfully detained and money was paid to recover them, the money, being paid under a species of duress or constraint, might be recovered back<sup>3</sup>, though it might be that this was only the case where the money had been paid under protest without any binding agreement<sup>4</sup>.

In modern times, the courts have accepted the general availability of a defence of duress of goods to an action for breach of contract, the recognition that this is really a new rule leading to the application of a new name, economic duress<sup>5</sup>. This new principle of economic duress has been applied in a number of cases<sup>6</sup> where B was induced to contract by a threat by A to commit an unlawful act<sup>7</sup>. However, the principle has been held not to apply in the following circumstances: where B's consent was not vitiated by the pressure<sup>8</sup>; or where B had impliedly affirmed the contract<sup>9</sup>; or where B had a reasonable alternative<sup>10</sup>; or where B acceded to legitimate commercial pressure<sup>11</sup>. It is for consideration whether a threat to commit an otherwise lawful act may amount to economic duress<sup>12</sup>.

Sometimes, there is an already existing contract between A and B, and A makes the threat to induce B to forgo his contractual rights. In such circumstances, B's subsequent agreement may not be binding on him: it may lack the consideration necessary for a binding contract<sup>13</sup>; or it may be inequitable for it to take effect as an equitable estoppel<sup>14</sup>; or it may amount to undue influence<sup>15</sup> or an unconscionable bargain<sup>16</sup> or bad faith dealing<sup>17</sup>. On the other hand, in the absence of any relevant threat, B's subsequent agreement may sometimes take effect as a binding contract on the basis that a 'practical benefit' provided sufficient consideration<sup>18</sup>.

1 See eg *Skeate v Beale* (1840) 11 Ad & El 983 at 990 per Lord Denman CJ; *Liverpool Marine Credit Co v Hunter* (1868) 3 Ch App 479. Thus, fear of the expense of a bankruptcy commission was not duress: *Powell v Hoyland* (1851) 6 Exch 67. The older authorities were not uniform on this point: see 1 Roll Abr 687 and *Astley v Reynolds* (1731) 2 Stra 915; see also Bacon's Maxims, Regula 18; and *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 337, [1974] 3 All ER 757 at 763, CA, obiter per Lord Denning MR (duress of goods renders a contract voidable, citing *Astley v Reynolds* supra). See also *The Unitas* [1948] P 205, [1948] 1 All ER 421; affd sub nom *Lever Bros and Unilever NV v HM Procurator General* [1950] AC 536, PC.

2 The inadequacy of the consideration is normally irrelevant to the formation of a contract: see para 736 post.

3 *Wakefield v Newbon* (1844) 6 QB 276; *Oates v Hudson* (1851) 6 Exch 346.

4 *Atlee v Backhouse* (1838) 3 M & W 633 at 650; *Parker v Bristol and Exeter Rly* (1851) 6 Exch 702 at 705. There are cases inconsistent with this proposition: see eg *Spanish Government v North of England Steamship Co Ltd* (1938) 54 TLR 852; and it may be that the rule that duress of goods does not invalidate only applied where there was purported execution of legal process: see *Wakefield v Newbon* (1844) 6 QB 276; *Oates v Hudson* (1851) 6 Exch 346; *Occidental Worldwide Investment Corp v A/S Avanti, The Siboen* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170.

5 *Occidental Worldwide Investment Corp v Skibs A/S Avanti, The Siboen* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170; *Pao On v Lau Yiu Long* [1980] AC 614, [1979] 3 All ER 65, PC; *Universe Tankships Inc of Monrovia v International*

*Transport Workers' Federation* [1981] ICR 129, CA; revsd on other grounds [1983] 1 AC 366, [1982] 2 All ER 67, HL.

6 *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1981] ICR 129, CA (revsd on other grounds [1983] 1 AC 366, [1982] 2 All ER 67, HL); *B & S Contracts & Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, CA; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641; *Vantage Navigation Corp v Suhail and Saud Bahwan Building Materials LLC, The Alev* [1989] 1 Lloyd's Rep 138; *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck* [1992] 2 AC 152, [1991] 4 All ER 871, HL (economic duress admitted).

7 Eg a threat to commit a crime or tort. But a threat to commit a breach of contract is not necessarily economic duress: *Pao On v Lau Yiu Long* [1980] AC 614, [1979] 3 All ER 65, PC.

8 *Occidental Worldwide Investment Corp v Skibs A/S Avanti, The Siboen* [1976] 1 Lloyd's Rep 293 (case may be explicable on other grounds: see note 11 infra). See also *Pao On v Lau Yiu Long* [1980] AC 614 at 635, [1979] 3 All ER 65 at 78, PC, per Lord Scarman: 'it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an alleged adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it'.

9 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170 (even though B had not intended to affirm).

10 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170; *Vantage Navigation Corp v Suhail and Saud Bahwan Building Materials LLC, The Alev* [1989] 1 Lloyd's Rep 138. See also *Pao On v Lau Yiu Long* [1980] AC 614 at 635, [1979] 3 All ER 65 at 78, PC, per Lord Scarman, cited in note 7 supra; *Hennessey v Craigmyle & Co Ltd* [1986] ICR 461, CA.

11 *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944 (affd on other grounds [1985] 1 All ER 303, [1985] 1 WLR 173, CA); *CTN Cash & Carry Ltd v Gallagher Ltd* [1994] 4 All ER 714, CA. This principle may be the explanation of *Occidental Worldwide Investment Corp v Skibs A/S Avanti, The Siboen* [1976] 1 Lloyd's Rep 293.

12 Normally, a threat by A to exercise his legal rights cannot be unlawful (*Allen v Flood* [1898] AC 1, HL) and will not render a contract voidable (*Hardie and Lane Ltd v Chilton* [1928] 2 KB 306, CA). But some such threats may amount to economic duress: see eg *Norreys v Zeffer* [1939] 2 All ER 187 (D, with gaming debts, was threatened that his social club would be notified of his default); *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366 at 401, [1982] 2 All ER 67 at 89, HL.

13 *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; and see para 1023 post.

14 *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; and see para 1033 post.

15 See para 712 post.

16 See para 716 post.

17 See para 613 ante.

18 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA; and see para 747 post.

## UPDATE

### 711 Economic duress

NOTES--See *Capital Structures plc v Time & Tide Construction Ltd* [2006] BLR 226.

TEXT AND NOTES 5-12--There are two elements in the wrong of duress, pressure amounting to compulsion of the will and the illegitimacy of the pressure: *A-G v R* [2003] UKPC 22, [2003] EMLR 499.

NOTE 6--See *Alf Vaughan & Co Ltd (in administrative receivership) v Royscot Trust plc* [1999] 1 All ER (Comm) 856.

NOTE 8--See also *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620.



NOTE 13--See also *Kolmar Group AG v Traxpo Enterprises PVT Ltd* [2010] EWHC 113 (Comm), [2010] All ER (D) 26 (Feb). See, however, *A-G v R* [2003] UKPC 22, [2003] EMLR 499 (soldier told he would be moved to another regiment where he would receive a lower rate of pay if he did not sign a confidentiality agreement; Crown entitled to move soldier to other regiment and could not fetter its discretion by contract; Crown's forbearance of exercising its power to move soldier to other regiment amounted to consideration).

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### **C. UNDUE INFLUENCE AND UNCONSCIONABLE BARGAINS**

#### **712. In general.**

A court of equity will set aside a transaction entered into as a result of conduct which, though not amounting to actual fraud or deceit, is contrary to good conscience<sup>1</sup>. Many of the cases in which undue influence arises relate to gifts<sup>2</sup>, but the same principles apply to contracts<sup>3</sup> and unconscionable bargains<sup>4</sup>. Whilst the common law doctrine of duress was originally justified on grounds of interference with consent<sup>5</sup>, the equitable doctrine of undue influence has been said to be based on 'constructive fraud'<sup>6</sup>; that is, to prevent persons from being able to retain the benefit of a fraud or wrongful act<sup>7</sup>. In the field of contract, the doctrine has been defined as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract<sup>8</sup>. It applies even where the person benefited by the transaction is a different person from the one who exerted undue influence to bring it about<sup>9</sup>.

After considerable development by the courts, in 1993 the circumstances in which a person (B) who has been induced to enter into a transaction by the undue influence of another (A) is entitled to set that transaction aside as against A were judicially redefined<sup>10</sup>.

1 *Nocton v Lord Ashburton*[1914] AC 932 at 953, HL, per Viscount Haldane LC.

2 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 839 et seq.

3 *Tufton v Sporni* [1952] 2 TLR 516 at 526, CA, per Jenkins LJ.

4 See para 716 post.

5 See para 709 ante.

6 *Nocton v Lord Ashburton*[1914] AC 932 at 954, HL, per Viscount Haldane LC.

7 See *Allcard v Skinner*(1887) 36 ChD 145 at 190, CA, per Bowen LJ: 'This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play'.

8 *Earl of Aylesford v Morris*(1873) 8 Ch App 484 at 490 per Lord Selborne LC. As to the modern test of good faith dealing, which the doctrine set out in the text resembles, see para 613 ante.

9 *Wright v Carter*[1903] 1 Ch 27; *Bullock v Lloyds Bank Ltd*[1955] Ch 317 at 324, [1954] 3 All ER 726 at 729 per Vaisey J.

10 *Barclays Bank plc v O'Brien*[1994] 1 AC 180 at 189, [1993] 4 All ER 417 at 423, HL, per Lord Browne-Wilkinson delivering the unanimous judgment of the court. See further paras 713-714 post.

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### 713. Actual undue influence.

In cases of actual undue influence, it is necessary for the claimant (B) to prove affirmatively that the wrongdoer (A) exerted undue influence on B to enter into the particular transaction which is impugned<sup>1</sup>. If he does so, the court has jurisdiction to grant relief to B<sup>2</sup>; and it has done so in the following instances: an employee obtained complete control over his employer, who was of weak understanding<sup>3</sup>; an older man acquired a strong influence over a weaker one<sup>4</sup>; A threatened to prosecute B's son<sup>5</sup>; A used misrepresentation and undue influence over his wife, B<sup>6</sup>.

Cases of actual undue influence are discussed in more detail elsewhere in this work<sup>7</sup>.

1 *Smith v Kay* (1859) 7 HL Cas 750 at 779 per Lord Kingsdown; *Levin v Roth* [1950] 1 All ER 698n, CA. As to judicial redefinition of the circumstances in which a person (B) who has been induced to enter into a transaction by the undue influence of another (A) is entitled to set that transaction aside as against A see para 712 text and note 10 ante.

2 The fact that a party is bound to accept the terms of a contract offered by a government board because it is the sole supplier of the goods to be sold does not make it a contract obtained by undue influence: *Eric Gnapp Ltd v Petroleum Board* [1949] 1 All ER 980, CA; *Mustafa v Hudaverdi* (1972) 223 Estates Gazette 1751.

3 *Bridgeman v Green* (1755) 2 Ves Sen 627; *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390 (gifts).

4 *Smith v Kay* (1859) 7 HL Cas 750 (B executed securities for debts incurred in mutual dissipation with A). See also *Morley v Loughnan* [1893] 1 Ch 736.

5 *Williams v Bayley* (1866) LR 1 HL 200 (B's son forged B's signature on promissory notes: bill in Chancery); *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389, [1937] 2 All ER 657 (threat to prosecute brother of a director of the contracting company and endangering father's health; not duress, but undue influence).

6 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL (husband (A) induced wife (B) to sign a joint mortgage of matrimonial home to obtain a joint loan by misrepresentation and undue influence. Held: after proving actual undue influence, B did not have to prove that the transaction thereby induced was manifestly to her disadvantage; and B could set aside the transaction as against A. As to the position as against the lender see para 715 post). In this case, Lord Browne-Wilkinson overruled *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA and cast doubts on the decision in *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL: see *CIBC Mortgages plc v Pitt* supra at 209 and at 439-440). See also *Goode Durrant Administration v Biddulph* [1995] 1 FCR 196; *Bank of Scotland v Bennett* [1997] 3 FCR 193, [1997] 1 FLR 801.

7 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 839 et seq.

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#### **714. Presumed undue influence.**

In cases of presumed undue influence, the claimant (B) only has to show, in the first instance, that there was a relationship of trust and confidence between himself and the wrongdoer (A) of such a nature that it is fair to presume that A abused that relationship in procuring B to enter into the impugned transaction. In such cases, therefore, there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to A to prove that B entered into the impugned transaction freely, for example by showing that the complainant had independent advice<sup>1</sup>. Such a confidential relationship can be established in two ways as described below<sup>2</sup>:

- 59 (1) certain relationships as a matter of law raise the presumption that undue influence has been exercised; these have been held to include the following<sup>3</sup>: a parent<sup>4</sup> or other person in loco parentis<sup>5</sup> exercising influence over a child; a solicitor exercising such influence over a client and analogous relationships<sup>6</sup>; a trustee exercising such influence over a beneficiary<sup>7</sup> and other confidential relationships<sup>8</sup>;
- 60 (2) even if there is no relationship falling within head (1) above, if B proves the de facto existence of a relationship under which B generally reposed trust and confidence in A, the existence of that relationship raises the presumption of undue influence. B will then, in the absence of evidence disproving undue influence, succeed in setting aside the impugned transaction merely by proof that B reposed trust and confidence in A without having to prove that A exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned. This category of confidential relationships has deliberately been left undefined by the courts<sup>9</sup>; but it has been held to include the following: spouses and other cases where there is an emotional relationship between co-habitees, whether heterosexual or homosexual<sup>10</sup>; a son exercising influence over his elderly parents<sup>11</sup>; a bank exercising influence over its elderly customer<sup>12</sup>.

1 *Wright v Carter* [1903] 1 Ch 27, CA; *McMaster v Byrne* [1952] 1 All ER 1362, PC; *Tufton v Spemi* [1952] 2 TLR 516, CA; *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA. As to judicial redefinition of the circumstances in which a person (B) who has been induced to enter into a transaction by the undue influence of another (A) is entitled to set that transaction aside as against A see para 712 text and note 10 ante; and see generally MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 843 et seq.

2 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 189, [1993] 4 All ER 417 at 423, HL, per Lord Browne-Wilkinson delivering the unanimous judgment of the court.

3 Categories so held do not include any of the following: employer/employee (*Matthew v Bobbins* [1980] 2 EGLR 97, CA); husband/wife (*CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); co-habitees (*Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL). See also *Lewis v Pead* (1789) 1 Ves 19.

4 *Wright v Vanderplank* (1856) 8 De GM & G 133; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 844.

5 *Harvey v Mount* (1845) 8 Beav 439; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 845.

6 *Willis v Barron* [1902] AC 271, HL; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 846.

7 *Hunter v Atkins* (1834) 3 My & K 113; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 848.

8 *Norton v Relly* (1764) 2 Eden 286; *Roche v Sherrington* [1982] 2 All ER 426, [1982] 1 WLR 599 (A an unincorporated religious association); and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 849.

9 *Re Craig, Meneces v Middleton* [1971] Ch 95 at 104, [1970] 2 All ER 390 at 396; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 852.

10 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL. See also *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA; *Bank of Scotland v Bennett* [1997] 3 FCR 193, [1997] 1 FLR 801; *Barclays Bank plc v Rivett* (1997) 29 HLR 893, CA.

11 *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA.

12 *Lloyds Bank Ltd v Bundy* [1975] QB 326, [1974] 3 All ER 757, CA (in the particular and unusual circumstances the bank was in a relationship with the defendant (its customer) which entailed a duty of fiduciary care and should not have allowed him to become a guarantor without independent advice). See also *Goldworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA. See further para 613 ante (good faith dealings).

## UPDATE

### 714 Presumed undue influence

TEXT AND NOTES--Although certain relationships give rise to a presumption that one party has influence over the other, that does not involve a presumption that he has unfairly exercised his influence: *A-G v R* [2003] UKPC 22, [2003] EMLR 499.

NOTE 10--A wife must establish undue influence by her husband and also that the transaction was to her manifest disadvantage: *Society of Lloyd's v Khan* [1999] 1 FLR 246, DC.

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### 715. Remedies in cases of undue influence.

Where a court is satisfied that a contract between A and B was induced by the undue influence of A<sup>1</sup>, the prima facie remedy of B is to apply to a court of equity to set aside the contract<sup>2</sup>. In some cases, the courts have simply rescinded the whole contract<sup>3</sup>; but in others they have rescinded the contract on terms<sup>4</sup>. In any event, such relief is barred on similar grounds to those which limit the right to rescind for misrepresentation<sup>5</sup>. However, assuming the right still stands, it may be exercised, not only as against A, but also as against third parties who obtained benefits under the contract with notice of the constructive fraud, although they gave valuable consideration<sup>6</sup>. Everything depends on whether the third party purchaser has actual or constructive notice of A's undue influence<sup>7</sup>; and, if he did, whether he can show that B entered into the transaction voluntarily and deliberately, with knowledge of its nature and effect<sup>8</sup>. This requirement has caused particular problems where a third party secured lender to A<sup>9</sup> has relied upon A to secure the informed consent of B<sup>10</sup>. Seemingly worried that, if they imposed an impossibly tough test on the lender, secured loans to small businesses might become too difficult to obtain, the courts at first only required that B obtained independent legal advice<sup>11</sup>, assuming that a solicitor would do his duty<sup>12</sup>. Subsequently, a more stringent test has been applied<sup>13</sup>.

1 See also *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA (B entered into contracts with companies under the control of A; for another point see note 4 infra); *Claughton v Price* [1997] EGCS 51, CA (A, ex-psychiatrist of B; transaction at undervalue); *McKenzie v Bank of Montreal* (1975) 55 DLR (3d) 641, Ont HC.

2 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL.

3 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL (even though B thought she was signing a charge for £60,000); *TSB Bank plc v Camfield* [1995] 1 All ER 951, [1995] 1 WLR 430, CA (B thought the loan was for £15,000).

4 *Cheese v Thomas* [1994] 1 All ER 35, [1994] 1 WLR 129, CA (B awarded 43:40 of proceeds of sale); *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA (management contract rescinded on terms which recompensed manager for its services); *Mahoney v Purnell* [1996] 3 All ER 61 (award of compensation); *Dunbar Bank plc v Nadeem* [1997] 2 All ER 253 (B must account to lender for money she obtained from it). It may even occasionally be possible to sever the part of the contract affected by the undue influence: *Barclays Bank plc v Caplan* [1998] 1 FLR 532, [1997] TLR 653. Cf *Dunbar Bank plc v Nadeem* (1998) Times, 1 July, CA (wife signed joint loan facility at her husband's request, thereby obtaining for the first time an equity of redemption in the lease; not manifestly disadvantaged so as to establish presumed undue influence by her husband; transaction as between wife and bank not set aside).

5 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) paras 863-864.

6 *Maitland v Irving* (1846) 15 Sim 437. It is otherwise where the third party is a bona fide purchaser of the legal interest without notice: *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Britannia Building Society v Pugh* (1997) 29 HLR 423, CA.

7 Some of the cases have relied on A being the agent of the third party: see eg *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA. The absence of agency has been used to explain why the third party lender was not tainted with A's undue influence: *Coldunell v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *National Westminster Bank plc v Beaton* (1998) 30 HLR 99, CA. Other courts have found the third party infected with actual or constructive notice of undue influence despite the fact that A did not act as his agent: *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, CA; *Barclays Bank plc v Kennedy* [1989] 1 FLR 356,

[1989] Fam Law 143, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on another point: see para 713 note 6 ante).

8 *Maitland v Backhouse* (1848) 16 Sim 58; *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA; *Barclays Bank plc v Boulter* [1997] 2 All ER 1002, [1998] 1 WLR 1, CA (burden of proof); and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 859.

9 Distinguish where the loan is to A and B jointly: *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Barclays Bank plc v Sumner* [1996] EGCS 65.

10 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL (HL suggested the lender should have held a separate meeting with B, at which she was told to seek independent legal advice); *Turner v Barclays Bank plc* [1997] 2 FCR 151.

11 *Massey v Midland Bank plc* [1995] 1 All ER 929, [1995] 1 FCR 380, CA; *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA; *Midland Bank plc v Serter* [1995] 3 FCR 711, [1995] 1 FLR 1034, (at the behest of A, B signed a certificate that she had been advised by a solicitor, when this was not the case); *Halifax Mortgage Services Ltd v Stepsky* [1996] Ch 207, [1996] 2 All ER 277, CA (same solicitor acted for all parties); *Barclays Bank plc v Thomson* [1997] 4 All ER 816, [1997] 1 FCR 541, CA (same solicitor acted for all parties).

12 See eg *Banco Exterior Internacional v Mann* [1995] 1 All ER 936, [1995] 2 FCR 282, CA; *Bank of Baroda v Rayarel* [1995] 2 FCR 631, [1995] 2 FLR 376, CA.

13 See eg *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, [1997] 2 FCR 1, CA (junior employee charged her flat to secure business loan to her employer. For another ground see para 716 note 22 post); *Royal Bank of Scotland plc v Etridge* [1997] 3 All ER 628, [1998] 1 FCR 222, CA.

## UPDATE

### 715 Remedies in cases of undue influence

NOTE 8--*Barclays Bank plc v Boulter*, CA, cited, reversed: [1999] 4 All ER 513, HL.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(5) CONSENT/ (iii) Duress, Undue Influence and Drunkenness/C. UNDUE INFLUENCE AND UNCONSCIONABLE BARGAINS/716. Unconscionable bargains.

### **716. Unconscionable bargains.**

Even in the absence of duress of persons or undue influence<sup>1</sup>, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law<sup>2</sup>: for instance, in respect of duress of goods<sup>3</sup> or salvage agreements<sup>4</sup>; or against contractual penalties<sup>5</sup>, forfeiture of mortgages<sup>6</sup>, extortionate loans<sup>7</sup> or expectant heirs<sup>8</sup>. Further, in respect of this last category, the jurisdiction extended beyond expectant heirs per se to all persons under pressure and without adequate protection, the usual requirements being that the sale was: (1) by a poor or ignorant person; (2) at a considerable undervalue; and (3) without independent legal advice<sup>9</sup>. In overseas common law jurisdictions, the above-mentioned principles have been steadily developed towards the provision of a general contractual remedy; for instance in Australia<sup>10</sup>, Canada<sup>11</sup> and the United States<sup>12</sup>.

In 1974, an English judge, also citing the doctrine of equitable or promissory estoppel<sup>13</sup>, sought to gather together the above-mentioned English common law instances by suggesting that through all of them runs a single thread of 'inequality of bargaining power': by virtue of it, English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other<sup>14</sup>. However, despite some favourable opinion<sup>15</sup>, most early English judicial reaction doubted whether there was a residuary equitable jurisdiction enabling the courts to interfere with freedom of contract on such grounds<sup>16</sup>. Sometimes this reluctance was grounded on the thesis that any such intervention should have a statutory basis<sup>17</sup>; and there is indeed some such statutory development: for instance, there are provisions enabling the courts to interfere with unfair consumer trade practices<sup>18</sup>, extortionate credit bargains<sup>19</sup>, swingeing exclusion clauses<sup>20</sup> and unfair terms<sup>21</sup>. However, there is subsequent authority suggesting that the 'inequality of bargaining power' doctrine may have survived<sup>22</sup>.

It is said that the remedies available in respect of unconscionable bargains are subject to the same rules as those made under undue influence<sup>23</sup>.

1 See paras 710-712 ante.

2 The common law is not interested in the adequacy of the consideration: see para 736 post. Moreover, it has been held that equity will not intervene merely because one party has superior bargaining power: *Burmah Oil Co v Bank of England* (1981) Times, 4 July; *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. It is otherwise where there is economic duress (see para 711 ante) or unilateral mistake as to terms (see *Watkin v Watson-Smith* (1986) Times, 3 July; and para 708 ante).

3 See para 711 ante.

4 See SHIPPING AND MARITIME LAW.

5 See DAMAGES.

6 See MORTGAGE.

7 See FINANCIAL SERVICES AND INSTITUTIONS.

8 See *O'Rorke v Bolingbroke* (1877) 2 App Cas 814, HL; the Law of Property Act 1925 s 174(2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 856.



- 9 See *Fry v Lane, Re Fry, Whittet v Bush* (1888) 40 ChD 312 at 322 per Kay J; but cf *Mountford v Scott* [1975] Ch 258, [1975] 1 All ER 198, CA.
- 10 See eg *Blomley v Ryan* (1956) 99 CLR 362, Aust HC; *Commercial Bank of Australia v Amadio* (1983) 57 ALJR 358, Aust HC.
- 11 See eg *Black v Wilcox* (1976) 70 DLR (3d) 192, Ont CA; *Paris v Machnik* (1972) 32 DLR (3d) 723, NS SC.
- 12 See the US *Uniform Commercial Code* art 2-302; and cases thereon.
- 13 The same judge did much to develop that doctrine: see para 1030 et seq post.
- 14 See *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 339, [1974] 3 All ER 757 at 765, CA, obiter per Lord Denning MR (for the decision in this case see para 714 note 12 ante).
- 15 See *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237, [1975] 1 WLR 61, CA.
- 16 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 726, [1973] 1 All ER 90 at 104, HL, per Lord Simon; *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 623, [1974] 1 WLR 1308 at 1315, HL, per Lord Diplock; and see *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA.
- 17 *National Westminster Bank plc v Morgan* [1985] AC 686 at 708, [1985] 1 All ER 821 at 830, HL, per Lord Scarman delivering the judgment of the court.
- 18 See the Fair Trading Act 1973 Pt II (ss 13-33) (as amended).
- 19 See the Consumer Credit Act 1974 ss 137-140 (s 139 as amended); and CONSUMER CREDIT paras 269-270 ante.
- 20 See the Unfair Contract Terms Act 1977; and para 820 et seq post.
- 21 See the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; and para 790 et seq post.
- 22 *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, CA. Indeed, this whole corpus of English law might fit well into the notion of good faith dealing: see para 613 ante.
- 23 *Allcard v Skinner* (1887) 36 ChD 145 at 187, CA, per Lindley LJ; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 838 et seq.

## UPDATE

### 716 Unconscionable bargains

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 2--A party will not be granted relief against an agreement on the basis of unconscionable bargain unless he can show impropriety by the other party both in the manner in which the agreement was reached and the terms of the agreement: *Kalsep Ltd v X-Flow BV* (2001) Times, 3 May.

NOTE 10--See also *Bridgewater v Leahy* (1998) ALR 66, Aust HC.

NOTE 18--Fair Trading Act 1973 Pt II repealed: Enterprise Act 2002 Sch 26; SI 2008/1277.

NOTE 21--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(5) CONSENT/ (iii) Duress, Undue Influence and Drunkenness/D. DRUNKENNESS/717. In general.

## **D. DRUNKENNESS**

### **717. In general.**

The fact that a party was drunk when he purported to enter into a contract may be a defence to an action on the contract; and it has been said that drunkenness is in this respect on the same footing as unsoundness of mind<sup>1</sup>. It may be that extreme intoxication will so deprive a person of his reason as to render his consent void<sup>2</sup>; but, in many cases the courts have contented themselves with a finding that the contract was voidable<sup>3</sup>. Where drunkenness is not such as to deprive a party of his reason, but merely of his business sense, the contract is at most voidable: generally, equity will not interfere either to avoid or to enforce it<sup>4</sup>; but it will grant relief to the drunken party if he can show that his condition was known to the other party at the time when the contract was made, and that some unfair advantage has been taken of him<sup>5</sup>.

A drunken party is liable under such a contract if, after becoming sober, he ratifies it<sup>6</sup>, or enters into a contract de novo<sup>7</sup>; and he is, in any event, liable for the reasonable price of necessities sold and delivered to him<sup>8</sup>.

1 *Molton v Camroux*(1849) 4 Exch 17 at 19, Ex Ch, obiter per Patteson J. As to the effect of insanity on the formation of a contract see para 649 ante.

2 *Pitt v Smith* (1811) 3 Camp 33; *Fenton v Holloway* (1815) 1 Stark 126; *Gore v Gibson* (1845) 13 M & W 623, especially per Parke and Alderson BB; *Shaw v Thackray* (1853) 1 Sm & G 537 at 539 per Stuart V-C. But see *Matthews v Baxter*(1783) LR 8 Exch 132, cited in note 3 infra. There should be no problem with apparent consent (see para 702 ante), as in these cases it must be clear to the sober party that the other is incapacitated by drink.

3 *Say v Barwick* (1812) 1 Ves & B 195 (action to set aside a lease); *Matthews v Baxter*(1783) LR 8 Exch 132 (see notes 6-7 infra).

4 *Cooke v Clayworth* (1811) 18 Ves 12; and see EQUITY vol 16(2) (Reissue) para 748. Exceptionally equity may intervene even on behalf of a party who is not the one incapacitated: *Shaw v Thackray* (1853) 1 Sm & G 537.

5 *Imperial Loan Co Ltd v Stone*[1892] 1 QB 599, CA; *Cooke v Clayworth* (1811) 18 Ves 12 (intoxication not per se a ground for relief in equity): see also *Rich v Sydenham* (1671) 1 Cas in Ch 202; *Johnson v Medlicott* (1734) 3 P Wms 130n. As to equitable relief see generally EQUITY. As to claims for specific performance of contracts made by persons under the influence of drink see SPECIFIC PERFORMANCE vol 44(1) (Reissue) para 676.

6 *Matthews v Baxter*(1783) LR 8 Exch 132 (for another explanation of this case see note 7 infra). In this case, all four members of the Court of Exchequer agreed that a contract could only be ratified if it were rendered voidable rather than void by drunkenness; *Ketsey's Case* (1613) Cro Jac 320.

7 *Northcote v Doughty* (1879) 4 CPD 385 (but actions for breach of promise of marriage have now been abolished: see the Law Reform (Miscellaneous Provisions) Act 1970 s 1). Whilst not mentioned in the case, this rule may be an alternative explanation of *Matthews v Baxter*(1783) LR 8 Exch 132 (see note 6 supra).

8 See the Sale of Goods Act 1979 s 3(2). 'Necessaries' here means goods suitable to his condition in life and to his actual requirements at the time of the sale and delivery: see s 3(3). See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 37.

## **UPDATE**

**717 In general**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 8--1979 Act s 3(2) amended: Mental Capacity Act 2005 Sch 6 para 24.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(i) In general/718. The requirement.

## **(6) INTENTION TO CREATE LEGAL RELATIONS**

### **(i) In general**

#### **718. The requirement.**

It has probably now become a rule of English common law<sup>1</sup> that an agreement will not be enforced unless it evinces an intention to create legal relations<sup>2</sup>. It follows that it is not sufficient that there is an agreement<sup>3</sup> supported by consideration<sup>4</sup>, unless the parties also evince an intention to create legal (that is contractual<sup>5</sup>) relations<sup>6</sup>.

In many instances there can be no doubt that a legal relationship was intended, and in others it will be equally clear that it was not<sup>7</sup>; but there will also be cases where the matter remains in doubt, and the court is then faced with the task of determining the intention of the parties. Ordinarily, the test will be the objective<sup>8</sup> one of whether a reasonable person would regard the offer made to him as one which was intended to create legal relations<sup>9</sup>; but what is decided may be considerably influenced by the importance of the agreement to the parties, and this is especially the case if one of them has performed his side of that agreement<sup>10</sup>.

1 Contra the US writer, Williston, *Law of Contract* (3rd Edn) (1957) s 21: 'The common law does not require any positive intention to create a legal obligation as an element of contract'. But see the less dogmatic statements of Corbin *Contracts* (1963) s 34.

2 Alternatively, intention to create legal relations may be seen as part of consideration, and falling within the rule that consideration is no consideration unless bargained for (see para 729 post); or it may sometimes be viewed within the dichotomy of offer/invitation to treat (see paras 632-634 ante).

3 As to agreements see para 631 et seq ante.

4 As to consideration see para 727 et seq post.

5 Distinguish conditional gifts: see para 670 ante.

6 See eg *Taylor v Brewer* (1813) 1 M & S 290; *Balfour v Balfour* [1919] 2 KB 571, CA.

7 Eg where the parties expressly deny any such intent as by making their agreement 'subject to contract': see para 670 ante; and see further para 721 post.

8 *Connell v Motor Insurers' Bureau* [1969] 2 QB 494 at 505, [1969] 3 All ER 572 at 575, CA, per Sachs LJ. For discussion of the subjective and objective tests of agreement and consent see paras 631, 701-702 ante. But see the remarks of Megaw J in *Edwards v Skyways Ltd* [1964] 1 All ER 494 at 500, [1964] 1 WLR 349 at 355-356.

9 See eg *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA; *Buckpitt v Oates* [1968] 1 All ER 1145. Cf intention to create a trust: see para 762 post.

10 *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169, [1962] 3 All ER 593, CA. Compare the greater readiness of the courts to infer that an agreement has been completed where it has been executed: see para 675 ante.

### **UPDATE**

#### **718 The requirement**

NOTE 2--As a matter of policy, a claimant may not bring a claim against the Commissioners of Customs and Excise or the police in respect of information supplied to them: *Robinson v Customs and Excise Comrs*(2000) Times, 28 April.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(i) In general/719. The intention of the parties.

### **719. The intention of the parties.**

Whilst an intention on the part of the parties to an agreement to create legal relations is necessary before that agreement will be enforceable<sup>1</sup>, such an intention will usually be inferred from the presence of consideration<sup>2</sup>. But this is not always the case, as where there is a mere family, domestic or social engagement<sup>3</sup>. To aid them in their sometimes difficult task of ascertaining the intention of the parties, the courts have therefore become accustomed to divide the cases into two classes: (1) commercial agreements; (2) family, domestic or social agreements<sup>4</sup>.

In the case of family, domestic or social agreements, it is presumed that there is no intention to create legal relations<sup>5</sup>; but there is presumed to be such an intention in the case of commercial agreements<sup>6</sup>.

1 See para 718 ante.

2 Eg commercial agreements: see para 720 post.

3 See para 723 post.

4 See *Rose and Frank Co v JR Crompton & Bros Ltd* [1923] 2 KB 261 at 282, CA, per Bankes LJ, and at 288 per Scrutton LJ; decision partially revsd but not on this point [1925] AC 445, HL.

5 See para 723 post.

6 See para 720 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(ii) Commercial Agreements/720. The general rule.

## (ii) Commercial Agreements

### 720. The general rule.

In the case of agreements regulating business relations, it follows almost as a matter of course that the parties intend legal consequences to follow<sup>1</sup>. Ordinarily, such an implication will be deduced from the existence of consideration<sup>2</sup>; and this is particularly the case where a party signs an agreement knowing it to be such<sup>3</sup>, even where that agreement is drafted by laymen<sup>4</sup>. The following commercial agreements have been held to intend to create legal relations: a statement made during a 'courtesy call'<sup>5</sup>; a written agreement between shipowners and a harbour authority for use of a terminal<sup>6</sup>; an arbitration agreement allowing arbitrators to abstain from judicial formality<sup>7</sup>; commodity contracts displaceable if the seller re-sold to a third party<sup>8</sup>; a telephone agreement to publish a book made with an author<sup>9</sup>.

But the implication that the parties to a commercial agreement intend to create legal relations is only a presumption, albeit a strong one<sup>10</sup>, and it may be displaced either expressly<sup>11</sup> or impliedly<sup>12</sup>. Moreover, the presumption does not seem to apply to statements inducing a contract, even where those statements could only take effect as a collateral contract<sup>13</sup>. Further, it is not within the competence of the Crown to make a contract which would have the effect of limiting its power of future executive action<sup>14</sup>.

In some cases, the matter is settled by statute: for instance, a regulated agreement expressly requires a statement that the agreement is intended to create legal relations<sup>15</sup>; whereas, in the field of labour relations, collective agreements are presumed not to be legally binding<sup>16</sup>, though their terms may also be incorporated in individual binding employment contracts<sup>17</sup>. Arrangements between the National Health Service and general practitioners would appear to be in a special position<sup>18</sup>.

1 *Rose and Frank Co v JR Crompton & Bros Ltd*[1923] 2 KB 261 at 282, CA, per Bankes LJ; and see at 293 per Atkin LJ; decision partially revsd [1925] AC 445, HL; *Winsco Manufacturing Ltd v Raymond Distributing Co Ltd* [1957] OR 565 at 570, 10 DLR (2d) 699 at 704 (Ont) per Thompson J.

2 *Carlill v Carbolic Smoke Ball Co*[1893] 1 QB 256, CA. Contra family agreements: see para 724 note 1 post.

3 See para 686 ante. But see *Pattle v Hornibrook*[1897] 1 Ch 25; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 190.

4 *Snelling v John G Snelling Ltd*[1973] QB 87, [1972] 1 All ER 79: see also para 725 note 7 post.

5 *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd*[1976] 2 All ER 930, [1976] 1 WLR 1078, CA (but see para 722 note 4 post).

6 *Thoresen Car Ferries Ltd v Weymouth Portland Borough Council* [1977] 2 Lloyd's Rep 614.

7 *Home Insurance Co and St Paul Fire and Marine Insurance Co v Administratia Asigurarilor De Stat* [1983] 2 Lloyd's Rep 674.

8 *Haryanto v ED & F Man (Sugar) Ltd* [1986] 2 Lloyd's Rep 44, CA.

9 *Malcolm v Chancellor, Masters and Scholars of the University of Oxford*(1990) Times, 19 December, CA.

10 'The onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one': *Edwards v Skyways Ltd*[1964] 1 All ER 494 at 500, [1964] 1 WLR 349 at 355 per Megaw J.



11 See para 721 post.

12 See para 722 post.

13 'Not only the terms of such contracts, but the existence of an *animus contrahendi* (intention to be bound) on the part of all the parties to them must be clearly shown': *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 47, HL, per Lord Moulton. For the issue of when a representation becomes a contractual term see further para 768 post.

14 *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500.

15 A regulated agreement is not properly executed unless signed by the debtor or hirer in the prescribed manner: see the Consumer Credit Act 1974 s 61(1)(a); and CONSUMER CREDIT vol 9(1) (Reissue) para 160. Under the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, reg 2 (as amended), Sch 5, the signature box where the debtor or hirer must sign, refers to the type of agreement and continues 'Sign it only if you want to be legally bound by it': see CONSUMER CREDIT 9(1) (Reissue) para 162.

16 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 179(1); para 752 post; and EMPLOYMENT vol 41 (2009) PARA 1138.

17 *Robertson v British Gas Corpn*, *Jackson v British Gas Corpn* [1983] ICR 351, CA; *Marley v Forward Trust Group Ltd* [1986] ICR 891, CA; *Burke v Royal Liverpool University Hospital NHS Trust* [1997] ICR 730, EAT; and see EMPLOYMENT vol 39 (2009) PARAS 91-92.

18 *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, [1992] 1 All ER 705, HL.

## UPDATE

### 720 The general rule

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 1--See also *Maple Leaf Marco Volatility Master Fund v Rouvroy* [2009] All ER (D) 199 (Nov), CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(ii) Commercial Agreements/721. Intention expressly negated.

## **721. Intention expressly negated.**

Whilst in the case of commercial agreements there is a presumption that the parties intend to create legal relations<sup>1</sup>, that presumption may be expressly negated; for instance the agreement may be made 'subject to contract'<sup>2</sup>; or include an 'honour clause'<sup>3</sup>, such as is frequently the case in respect of football pools<sup>4</sup>; or letters of comfort or intent<sup>5</sup>.

However, to oust expressly the presumption of intention to create legal relations, clear words must be used<sup>6</sup>, as in the case of provisional agreements<sup>7</sup>; so that, for instance, it is not enough simply to describe a promised payment as being *ex gratia*<sup>8</sup>. Furthermore, whilst there is no reason of public policy why the parties should not prevent their agreement from being legally binding<sup>9</sup>, they may not oust the jurisdiction of the court by purporting to enter into an agreement solely enforceable by some agency other than the courts<sup>10</sup>.

1 See para 720 ante.

2 *Rose and Frank Co v JR Crompton & Bros Ltd* [1923] 2 KB 261 at 294, CA, obiter per Atkin LJ; decision partially revsd [1925] AC 445, HL. As to conditional agreements see paras 670-671 ante.

3 *Rose and Frank Co v JR Crompton & Bros Ltd* [1925] AC 445, HL.

4 *Jones v Vernon's Pools Ltd* [1938] 2 All ER 626; *Appleson v H Littlewood Ltd* [1939] 1 All ER 464, CA; *Lee v Sherman's Pools Ltd* [1951] WN 70, CA; *Guest v Empire Pools Ltd* (1964) 108 Sol Jo 98. See also *Ferguson v Littlewoods Pools Ltd* 1997 SLT 309.

5 See para 668 ante.

6 See eg *Rose and Frank Co v JR Crompton & Bros Ltd* [1925] AC 445, HL; *Orion Insurance Co plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239, CA (parol evidence admissible for this purpose: see para 690-700 note 10 ante). See also *Moir v JP Porter Co Ltd* (1979) 103 DLR (3d) 22, NS SC.

7 *Ali v Ahmed* (1996) 71 P & CR D39, CA (negotiation for sale to a joint venture of five persons; draft agreement signed by three. Held: draft agreement not intended to be binding in advance of a legal contract to be signed by all five). As to provisional agreements see para 669 ante.

8 *Edwards v Skyways Ltd* [1964] 1 All ER 494, [1964] 1 WLR 349.

9 *Rose and Frank Co v JR Crompton & Bros Ltd* [1923] 2 KB 261 at 288, CA, per Scrutton LJ; affd on this point [1925] AC 445 at 454, HL; *Appleson v H Littlewood Ltd* [1939] 1 All ER 464, CA.

10 As to attempts to oust the jurisdiction of the court see para 856 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(ii) Commercial Agreements/722. Intention negated by implication.

## **722. Intention negated by implication.**

Whilst in the case of commercial agreements there is a presumption of an intention to create legal relations<sup>1</sup>, that presumption may be negated either expressly<sup>2</sup> or impliedly<sup>3</sup>. The presumption will be impliedly negated where for example a statement is made to induce a party to enter a contract but the statement is so vague, or so clearly one of opinion or not seriously meant, that the law will refuse to give it any effect<sup>4</sup>; such a statement may be termed a mere puff<sup>5</sup>, or it may amount to a mere representation<sup>6</sup>. It has been held also that the presumption has been impliedly negated in the following cases: an arrangement entered into in the belief that it merely gave effect to pre-existing rights<sup>7</sup>; where there was a deliberate use of the vague expression 'understanding' to describe an arrangement<sup>8</sup>; a 'guarantee' given during a heated discussion<sup>9</sup>; a mere licence for a competitor to enter the race inclosure<sup>10</sup>. There are apparently conflicting decisions in respect of the issue and acceptance of a 'free' travel pass: it has been held that such a pass issued to an employee did not create a contract<sup>11</sup>; but that a contract was created by the issue of one to an old age pensioner<sup>12</sup>. Furthermore, 'free gifts' may fall into either category: they may actually be intended to be gifts<sup>13</sup>; or they may be intended to form part of the main contract<sup>14</sup>, or of a collateral contract<sup>15</sup>.

One troublesome situation which deserves special mention is that where an 'agreement' gives a very wide discretion to one party as to performance. Not only may the discretionary promises be too vague to constitute consideration<sup>16</sup>, but that vagueness may indicate that there is no intention to create legal relations; for instance an agreement to work for 'such remuneration ... as should be deemed right'<sup>17</sup>; or an agreement which gives one party a discretion to rescind<sup>18</sup>. On the other hand, the courts would seem to be reluctant to reach such a conclusion in the case of a commercial agreement, particularly where the other party has performed his side of the bargain<sup>19</sup>.

1 See para 720 ante.

2 See para 721 ante.

3 See eg *Cardy v City of London Corpn* [1950] 2 All ER 475 (a resolution passed by the corporation after a strike that there would be no victimisation was too vague to be a contract).

4 See eg *Weeks v Tybald* (1605) Noy 11 (promise by D to give £100 to the man who should marry D's daughter with his consent). Cf *Dalrymple v Dalrymple* (1811) 2 Hag Con 54 at 105, Consistory Court, per Sir William Scott; affd (1814) 2 Hag Con 137n. In *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA, there was a long-standing relationship between an importer and a forwarding agent; the agent made a 'courtesy call' on the importer at which he gave an assurance that the importer's goods would be carried under deck; Kerr J held that the assurance was not intended to be a collateral contract attached to subsequent orders; but this decision was reversed on appeal: see para 720 note 5 ante)

5 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 261, 266, CA, obiter per Lindley and Bowen LJ; *Bell v Moores* [1956] CLY 3743, CA.

6 See para 720 note 13 ante.

7 *Beesley v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549, especially at 323 and at 559 per Buckley J; affd on other grounds [1961] Ch 105, [1961] 1 All ER 90, CA. As to options see para 640 note 9 ante.

8 *JH Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894, [1966] 1 WLR 1582: see also paras 631 note 6, 667 note 7 ante.

9 *Licences Insurance Corp'n and Guarantee Fund Ltd v Lawson* (1896) 12 TLR 501.

10 *White v Blackmore* [1972] 2 QB 651, [1972] 3 All ER 158, CA. Cf *Bunting v Thorne RDC* [1956] CLY 4890. As to contractual licences see *Hurst v Picture Theatres Ltd* [1915] 1 KB 1, CA; and LANDLORD AND TENANT.

11 *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258, CA. On the face of it, it might be argued that the issue of the free pass should have been regarded as contractual because, although the pass was issued as a matter of course, it was, and would probably be known by the plaintiff prior to his employment to be, one of the perquisites of his employment, and hence part of the rewards of that employment. As to the formation of agreement in the case of the 'ticket contracts' see para 638 ante.

12 *Gore v Van Der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA, where *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258, CA, was distinguished on the grounds that there was no contractual animus, whilst 'the circumstances surrounding the issue of the free pass in the present case were quite different': *Gore v Van Der Lann* supra at 41 and at 365 per Willmer LJ; and see also at 45 and 368 per Salmon LJ. The pass in *Gore v Van Der Lann* supra was expressed to be a 'licence', though such a description is not necessarily conclusive: see *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513, [1957] 3 All ER 563, CA; and LANDLORD AND TENANT. On the other hand, such language might suggest a conditional licence rather than a contract; and there is also difficulty over the matter of consideration: see para 730 post.

13 *Esso Petroleum Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, HL (four of their Lordships held as the main issue that there was no 'sale' of the 'World Cup coins' within the Purchase Tax Act 1963 (repealed): two of these thought that there was no contract in respect of the coins (Viscount Dilhorne and Lord Russell); the others that there was such a contract (see notes 14-15 infra). As to gifts see further para 608 note 4 ante.

14 *Esso Petroleum Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, HL (Lord Fraser, dissenting on the main issue). Cf *Gedding v Marsh* [1920] 1 KB 668, DC (purchase of mineral water in a refundable bottle).

15 *Esso Petroleum Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, HL (Lords Simon and Wilberforce); *Bowerman v Association of British Travel Agents* (1995) Times, 24 November, CA (based on ABTA's public notice on the premises of the travel agents).

16 See para 735 post.

17 *Taylor v Brewer* (1813) 1 M & S 290 (services performed). See also *Shallcross v Wright* (1850) 12 Beav 558 (services performed); *Roberts v Smith* (1859) 28 LJ Ex 164 (executory); *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, [1965] 1 WLR 335 (services performed).

18 Cf sale or return transactions: see the Sale of Goods Act 1979 s 18 r 4; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 120-121. Contra where the right to rescind is expressly or impliedly restricted, in that it must not be exercised 'arbitrarily or capriciously or unreasonably': *Selkirk v Romar Investments Ltd* [1963] 3 All ER 994 at 999, [1963] 1 WLR 1415 at 1422, PC, per Viscount Radcliffe; and see SALE OF LAND. See also paras 964-965 post. For a case where an agreement was held to be legally binding notwithstanding that it purported to give both parties an unfettered discretion to cancel it see *Haggar v de Placido* [1972] 2 All ER 1029, [1972] 1 WLR 716 (overruled on another point *Donnelly v Joyce* [1974] QB 454, [1973] 3 All ER 475, CA).

19 The court may imply a promise to pay a reasonable sum: see eg *Bryant v Flight* (1839) 5 M & W 114; *British Bank for Foreign Trade v Novinex Ltd* [1949] 1 KB 623, [1949] 1 All ER 155, CA; *Powell v Braun* [1954] 1 All ER 484, [1954] 1 WLR 401, CA. As to claims quantum meruit see generally para 618 ante; RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq. Cf paras 674-675 ante.

## UPDATE

### 722 Intention negated by implication

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(iii) Family, Domestic or Social Agreements/723. The general rule.

### **(iii) Family, Domestic or Social Agreements**

#### **723. The general rule.**

Unlike commercial agreements<sup>1</sup>, in the case of family, domestic or social agreements there is a presumption, notwithstanding the presence of consideration, that the parties do not intend to create legal relations in the arrangements made between them<sup>2</sup>. This presumption may be seen in respect of agreements between spouses<sup>3</sup>, between parent and child<sup>4</sup>, and other agreements of a family, domestic or social nature<sup>5</sup>.

Furthermore, it is provided by statute that an agreement between two persons to marry one another may not under the law of England and Wales have effect as a contract giving rise to legal rights, and no action may lie in England and Wales for breach of such an agreement, whatever the law applicable to the agreement<sup>6</sup>.

1 See para 720 ante.

2 This presumption is rebuttable: eg see the cases cited in paras 724 notes 8, 10-11, 725 notes 5-9, 726 notes 4-6, 12 post.

3 See para 724 post.

4 See para 725 post.

5 See para 726 post.

6 See the Law Reform (Miscellaneous Provisions) Act 1970 s 1(1); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 16. See also para 742 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(iii) Family, Domestic or Social Agreements/724. Agreements between spouses.

#### **724. Agreements between spouses.**

One of the most usual forms of agreement which does not constitute a contract is the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves. Those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement<sup>1</sup>. Prima facie, such agreements are outside the realms of contract altogether, because the parties never intended that they should be sued upon<sup>2</sup>; but it is possible to show that such agreements constitute binding contracts by proving that the parties expressly so provided, or that this is a necessary implication from the circumstances of the parties<sup>3</sup>.

It has been held that the prima facie rule applies, and that there is no intention to create legal relations in the following cases: an agreement between spouses whereby the husband promises to pay the wife an allowance to cover her expenses, and she promises to apply the allowance for the purpose for which it is given<sup>4</sup>; and an arrangement under which both spouses draw on a joint account<sup>5</sup>. It has also been held that a husband who 'gives' his wife a car he has obtained on hire-purchase does not thereby assign his rights under the agreement to her<sup>6</sup>.

On the other hand, the following are examples of situations where the courts have implied from the circumstances an intention by the parties to enter into a binding contract: a separation agreement made between spouses when they agree to live apart<sup>7</sup> or after separation<sup>8</sup> (but not such an agreement made during cohabitation<sup>9</sup>); a promise before marriage by a man to his future wife to leave her a house if she married him<sup>10</sup>; an agreement whereunder the husband became the wife's tenant<sup>11</sup>; and mutual wills<sup>12</sup>.

Whilst it is clear from the preceding paragraph that spouses can impliedly enter into binding agreements, not only before marriage and after separation but also during cohabitation, the fact that the parties are living together in amity is a very strong factor tending to the conclusion that there was no intention to create legal relations<sup>13</sup>. Moreover, inquiries into arrangements made between parties during cohabitation in cases dealing with respective property rights between spouses whose marriage has broken down are essentially concerned with the attribution of intention through the medium of the law of trusts, and not with questions of contract<sup>14</sup>.

1 *Balfour v Balfour* [1919] 2 KB 571 at 578, CA, obiter per Atkin LJ.

2 *Balfour v Balfour* [1919] 2 KB 571 at 579, CA, per Atkin LJ.

3 See *Balfour v Balfour* [1919] 2 KB 571, CA, obiter per Warrington LJ; *Popiw v Popiw* [1959] VR 197 (Vict).

4 *Balfour v Balfour* [1919] 2 KB 571, CA. It has been said that this decision stretched the doctrine to its limits: *Pettitt v Pettitt* [1970] AC 777 at 816, [1969] 2 All ER 385 at 408, HL, per Lord Upjohn. See also *Gould v Gould* [1970] 1 QB 275, [1969] 3 All ER 728, CA (see note 7 infra).

5 *Gage v King* [1961] 1 QB 188, [1960] 3 All ER 62.

6 *Spellman v Spellman* [1961] 2 All ER 498, [1961] 1 WLR 921, CA.

7 But see *Gould v Gould* [1970] 1 QB 275, [1969] 3 All ER 728, CA, where it was held that an oral agreement (made on separation) by the husband to pay the wife a weekly sum 'as long as I can manage it' was uncertain

and that there was no intention to create legal relations (see note 4 supra; and para 672 note 35 ante); *Vaughan v Vaughan* [1953] 1 QB 762, [1953] 1 All ER 209, CA (no contract where the husband, on deserting his wife, said in relation to the matrimonial home that she could 'always live there').

8 *Wilson v Wilson* (1848) 1 HL Cas 538; *Hart v Hart* (1881) 18 ChD 670; *Ward v Byham* [1956] 2 All ER 318, [1956] 1 WLR 496, CA (see further para 725 note 5 post); *Merritt v Merritt* [1970] 2 All ER 760, [1970] 1 WLR 1121, CA.

9 Such agreements are generally void as being against public policy: see para 864 post. As to prenuptial contracts see para 864 note 2 post.

10 *Synge v Synge* [1894] 1 QB 466, CA. But see *Heathcoat-Amory v Alliance Assurance Co* [1952] CLY 637.

11 *Pearce v Merriman* [1904] 1 KB 80, DC.

12 It is possible to make a contract not to revoke a will: *Dufour v Pereira* (1769) Dick 419; *Hammersley v Baron De Biel* (1845) 12 Cl & Fin 45; *Re Brookman's Trust* (1869) 5 Ch App 182; *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63 at 70-71, [1997] 1 WLR 1216 at 1224-1226, CA, per Leggatt LJ. It is probably not against public policy as being in restraint of marriage (see para 862 post); but, if one of the parties remarries (thereby revoking his will: see the Wills Act 1837 s 18(1) (as substituted); and WILLS vol 50 (2005 Reissue) para 379 et seq.) it is probable that the mutual wills contract cannot be sued upon: cf *Re Marsland, Lloyd's Bank v Marsland* [1939] Ch 820, [1938] 4 All ER 279. However, failed mutual wills may lead to an award to the intended beneficiary under the Inheritance (Provision for Family and Dependents) Act 1975 s 2: see *Re Goodchild, Goodchild v Goodchild* [1997] 3 All ER 63, [1997] 1 WLR 1216, CA; and EXECUTORS AND ADMINISTRATORS. As to the creation of a constructive trust by mutual wills see *Dufour v Pereira* supra; *Re Dale, Proctor v Dale* [1994] Ch 31, [1993] 4 All ER 129; and TRUSTS vol 48 (2007 Reissue) para 692.

13 *Merritt v Merritt* [1970] 2 All ER 760, [1970] 1 WLR 1121, CA.

14 *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Cowcher v Cowcher* [1972] 1 All ER 943, [1972] 1 WLR 425. 'The conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque, and I certainly cannot take the further step of working out what they would have agreed if they had thought of making an agreement': *Pettitt v Pettitt* supra at 810 and at 403 per Lord Hodson. See also *Davis v Vale* [1971] 2 All ER 1021 at 1025, [1971] 1 WLR 1022 at 1026, CA, per Lord Denning MR. See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(iii) Family, Domestic or Social Agreements/725. Agreements between close relatives.

## **725. Agreements between close relatives.**

The presumption laid down in respect of agreements between spouses<sup>1</sup> also applies to family arrangements between close relatives, such as parent and child or uncle and nephew<sup>2</sup>. So, for example, it has been held that there was no intention to create legal relations in the following cases: where a mother agreed to pay her daughter an allowance if she would go to England and read for the Bar<sup>3</sup>; where a daughter promised to pay her mother a monthly sum towards the cost of the mother's maintaining the daughter's illegitimate child<sup>4</sup>.

However, the presumption does not seem to be quite as strong as in the case of agreements between spouses. Thus, in the following cases it was held that a binding contract had been made: a promise by a reputed father of an illegitimate child to pay the mother an annuity if she would maintain the child and keep secret their connection<sup>5</sup>; a promise by an uncle to pay his nephew an allowance if he married EN<sup>6</sup>; mutual promises between brother co-directors that they would not withdraw the money which each of them had put into the family business<sup>7</sup>; written agreements whereby, after he had suffered severe injuries in an accident, a party promised to pay his mother and brother weekly sums in return for nursing and physical assistance<sup>8</sup>; a promise by a bridegroom's parents to provide accommodation for the young couple<sup>9</sup>.

A licence granted by a man for his lover to occupy a house may fall either side of the line: sometimes it has been held to create a contract<sup>10</sup>; and sometimes not<sup>11</sup>. Difficult borderline situations may arise out of proposals between relatives to share a house. Where one party gives up his home and goes to look after the other party in return for a promise by that other to leave all his property to the former, it has been held that there was an intention to create legal relations<sup>12</sup>. On the other hand, it has been said that a proposal between relatives to share a house and a promise to make a bequest of the house may very well amount to no more than a family arrangement<sup>13</sup>.

1 See para 724 ante.

2 *Jones v Padavatton* [1969] 2 All ER 616 at 621, [1969] 1 WLR 328 at 332, CA, per Salmon LJ.

3 *Jones v Padavatton* [1969] 2 All ER 616, [1969] 1 WLR 328, CA.

4 *Berryere v Berryere* (1972) 26 DLR (3d) 764, BC SC. Cf the cases cited in note 5 infra.

5 *Jennings v Brown* (1842) 9 M & W 496. See also *Ward v Byham* [1956] 2 All ER 318, [1956] 1 WLR 496, CA. Cf *Berryere v Berryere* (1972) 26 DLR (3d) 764, BC SC.

6 *Shadwell v Shadwell* (1860) 9 CBNS 159 (case argued on issue of consideration: see para 746 post).

7 *Snelling v John G Snelling Ltd* [1973] QB 87, [1972] 1 All ER 79 (this decision is also explicable on the basis that it was a commercial agreement: see para 720 note 4 ante).

8 *Haggar v de Placido* [1972] 2 All ER 1029, [1972] 1 WLR 716 (overruled on another point *Donnelly v Joyce* [1974] QB 454, [1973] 3 All ER 475, CA).

9 *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA; *Hardwick v Johnson* [1978] 2 All ER 935, [1978] 1 WLR 683, CA.

10 *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA.



11 *Horrocks v Forray* [1976] 1 All ER 737, [1976] 1 WLR 230, CA.

12 *Parker v Clark* [1960] 1 All ER 93, [1960] 1 WLR 286 (nephew/uncle); *Wakeling v Ripley* (1951) 51 SR NSW 183 (sister/brother). See also the cases cited in para 726 note 6 post.

13 *Parker v Clark* [1960] 1 All ER 93 at 100, [1960] 1 WLR 286 at 292; *Re Gonin, Gonin v Gameson* [1979] Ch 16, [1977] 2 All ER 720.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/3. FORMATION OF CONTRACT/(6) INTENTION TO CREATE LEGAL RELATIONS/(iii) Family, Domestic or Social Agreements/726. Other cases.

## 726. Other cases.

As in the case of agreements between spouses and between close relatives<sup>1</sup>, there are many other social or domestic arrangements in which there is no intention to create legal relations. The ordinary example is where two parties agree to walk together, or where there is an offer and acceptance of hospitality<sup>2</sup>. In such cases, it may be right to say that there is a presumption that there is no intention to create legal relations<sup>3</sup>.

There are many other cases, however, where there is prima facie an intention to create legal relations, either because the agreement is clearly of a commercial character<sup>4</sup>, or the circumstances otherwise show that was the likely intention of the parties. Thus, where there is an agreement to enter a race or competition, it will usually be held to amount to a contract<sup>5</sup>. Similarly, where one party gives up his home and goes to look after the other party in return for a promise by that other to leave all his property to the former, it has been held that there was an intention to create legal relations<sup>6</sup>. Another example would be an agreement to take premises as a tenant or lodger<sup>7</sup>, though the presumption can of course be rebutted<sup>8</sup>.

In between, there are other situations where it does not seem to be possible to lay down a presumption, and everything depends on the intention of the parties<sup>9</sup>. For instance, it would seem that there is unlikely to be any intention to create legal relations where one person gives a lift to another on some isolated social occasion; and the same may well be true of lifts given regularly for social purposes, albeit there is a contribution towards the expenses<sup>10</sup>. Moreover, it has even been suggested that the courts will be reluctant to conclude that there was an intention to create legal relations where lifts were regularly given to work in return for a contribution to expenses<sup>11</sup>. On the other hand, it has been said that in the ordinary way, when a person agrees to carry another in his vehicle for payment there is a contract, albeit informal, no matter whether the payment is by way of contribution to the petrol or a reward for the lift<sup>12</sup>.

1 See paras 724-725 ante.

2 *Balfour v Balfour* [1919] 2 KB 571 at 578, CA, obiter per Atkin LJ; *Rose and Frank Co v JR Crompton & Bros Ltd* [1923] 2 KB 261 at 293, CA, obiter per Atkin LJ; decision partially revsd [1925] AC 445, HL; *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793 at 806, CA, obiter per Scrutton LJ.

3 See eg *H v H* (1983) Times, 22 April (agreement between two married couples prior to respective divorces whereby each husband would marry the other's wife and assume financial responsibility for her: not enforceable).

4 Cf *Snelling v John G Snelling Ltd* [1973] QB 87, [1972] 1 All ER 79. As to commercial agreements see para 720 ante.

5 *Simpkins v Pays* [1955] 3 All ER 10, [1955] 1 WLR 975; and see the cases cited in para 657 notes 3, 11 ante. But cf *Lens v Devonshire Club* (1914) Times, 4 December, referred to in *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793 at 806, CA.

6 *Wakeham v Mackenzie* [1968] 2 All ER 783, [1968] 1 WLR 1175; *Schaefer v Schuhmann* [1972] AC 572, [1972] 1 All ER 621, PC. See also *Meredith v Davey* [1960] CLY 544; *Foster v Royal Trust Co* [1950] OR 673, [1951] 1 DLR 147 (Ont); *Palmer v Bank of New South Wales* (1975) 7 ALR 671, Aust HC; and the cases cited in para 725 note 12 ante. But see *Briggs v Bryan* (1959) 1 WIR 92; *Lazarenko v Borowsky* [1966] SCR 556, 57 DLR (2d) 577, Can SC.

7 Cf the case cited in para 724 note 11 ante.

8 *Booker v Palmer* [1942] 2 All ER 674, CA; *Cobb v Lane* [1952] 1 All ER 1199, CA; *Spyropoulos v McClelland* [1959] 3 All ER 319n, [1959] 1 WLR 862, CA; *Heslop v Burns* [1974] 3 All ER 406, [1974] 1 WLR 1241, CA.

9 See para 718 ante.

10 *Buckpitt v Oates* [1968] 1 All ER 1145.

11 *Coward v Motor Insurers' Bureau* [1963] 1 QB 259 at 271, [1962] 1 All ER 531 at 536, CA, per Upjohn LJ, delivering the judgment of the court. See also *Albert v Motor Insurers' Bureau* [1972] AC 301 at 318, 319, [1971] 2 All ER 1345 at 1353, HL, obiter per Lord Donovan: for a contrary view of the facts of this case see at 339 and 1369 per Lord Cross.

12 *Connell v Motor Insurers' Bureau* [1969] 2 QB 494 at 503, [1969] 3 All ER 572 at 574, CA, obiter per Lord Denning MR. Cf *Motor Insurers' Bureau v Meanen* [1971] 2 All ER 1372n, HL.

## **UPDATE**

### **726 Other cases**

NOTE 5--See *Robertson v Anderson* 2003 SLT 235, IH (agreement between friends to share bingo prize upheld).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(i) The Requirement of Consideration/727. The general rule.

## 4. CONSIDERATION AND PRIVACY

### (1) CONSIDERATION

#### (i) The Requirement of Consideration

##### 727. The general rule.

Ordinarily, consideration<sup>1</sup> is one of the three essential elements of a valid contract<sup>2</sup>. Thus, a promise which is made without consideration may not be sued upon in the law of contract, for it is merely a bare promise<sup>3</sup> on which no such action will lie<sup>4</sup>. In the case of a contract which is divisible into two parts<sup>5</sup>, for only one of which there is valuable consideration, that part only gives rise to a cause of action<sup>6</sup>.

Consideration is not necessary, however, in respect of a promise made by deed<sup>7</sup>; and the rules of consideration have been modified in relation to bailments<sup>8</sup> and negotiable instruments<sup>9</sup>. Moreover, it seems that where a promise is given without consideration but is intended by the promisor to affect an existing contract between him and the promisee, and is intended to be acted upon by the promisee and is in fact so acted upon, such a promise may be set up by the promisee as a defence to an action by the promisor to enforce the existing contract<sup>10</sup>; but it cannot be sued upon as a separate contractual cause of action by the promisee<sup>11</sup>.

On the other hand, a promise made without consideration may give rise to liability in the tort of negligence<sup>12</sup>. It has also been questioned for how long the principles of consideration and privity of contract will continue to be maintained<sup>13</sup>: already, much of the work of the doctrine of consideration could be undertaken by the principles of intention to create legal relations<sup>14</sup>; once such an intention is shown, there is almost a presumption that consideration exists<sup>15</sup>, as witness the apparent acceptance of benefit in fact as consideration<sup>16</sup>. The doctrine of consideration may be separating from the privity rule<sup>17</sup>.

1 For the meaning of 'consideration' see para 728 post. As to the admissibility of parol evidence to prove consideration in a written contract see *Turner v Forwood*[1951] 1 All ER 746, CA; para 690-700 note 14 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 194.

2 See para 603 ante.

3 I.e. a nudum pactum: see eg *Four Oaks Estate Ltd v Hadley*(1986) Times, 2 July, CA. Distinguish nominal consideration: see para 733 post.

4 *Rann v Hughes* (1778) 7 Term Rep 350n, HL; *Davis v Dodd* (1812) 4 Taunt 602 (promise to pay amount of lost bill of exchange); *Williams v Stern*(1879) 5 QBD 409, CA (promise to give time for payment of instalment under bill of sale); *Haigh v Brooks* (1839) 10 Ad & El 309; affd sub nom *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch (guarantee for past debt); *Clay v Willis* (1823) 1 B & C 364 (promise to pay person not entitled to receive payment); *Brealey v Andrew* (1837) 7 Ad & El 108 (promise to pay debt for which promisor not liable); *Payne v New South Wales Coal and Intercolonial Steam Navigation Co*(1854) 10 Exch 283 (promise to employ person, with no obligation on the promisee to act); *Guthrie v Lister* (1866) 11 Moo Ind App 129, PC (voluntary payment of higher rate of interest than legally due); *McManus v Bark*(1870) LR 5 Exch 65 (agreement to give time for payment); *Wilkinson & Co v Unwin*(1881) 7 QBD 636, CA (indorsement of bill as surety); *Sanderson v Workington Borough Council* (1918) 34 TLR 386 (resolution by education authority to pay salary during war service to mobilised territorial officer); *Balfour v Balfour*[1919] 2 KB 571, CA (agreement by husband to make allowance to wife in consideration of her agreeing to support herself); *Vanbergen v St Edmunds Properties Ltd*[1933] 2 KB 223, CA (variation in method of paying debt solely for convenience of plaintiff; held, no consideration as no benefit accrued to defendant); *Gaisberg v Storr*[1950] 1 KB 107, [1949] 2 All ER 411, CA

(wife's promise not to claim maintenance after decree nisi held no consideration as her promise did not preclude her from so claiming); *Roberts v J & F Stone Lighting and Radio Ltd* (1945) 172 LT 240 (no consideration; alleged promise to give evidence); *Wyatt v Kreglinger and Fernau*[1933] 1 KB 793, CA (grant of pension); *Argy Trading Development Co Ltd v Lapid Developments Ltd*[1977] 3 All ER 785, [1977] 1 WLR 444 (failure to continue insurance; for other points see para 608 note 6 ante, and note 11 infra). See also *BR Meadows & Sons v Rockman's General Store Pty Ltd* [1959] VR 68 (promise not to sue for debt); *Saltzberg and Rubin v Hollis Securities Ltd* (1964) 48 DLR (2d) 344 (NS) (person receiving three identical tenders promised to accept highest of new offers by 3 pm); *Gilbert Steel Ltd v University Construction Ltd* (1976) 12 OR (2d) 19, Ont CA.

5 As to the distinction between entire and divisible contracts see para 922 post.

6 *Wood v Benson* (1831) 2 Cr & J 94 (guarantee to pay for all gas to be supplied to a theatre, and also to pay for all arrears which might be then due; void as to the arrears for want of consideration, but divisible, and valid as to gas consumed after the date of the guarantee).

7 In earlier times, this was rationalised by saying that, as between the parties, the (then required) seal imported its own consideration: see Fitzherbert's Grand Abridgment, Barre 37; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 59. Most deeds no longer require a seal: see para 616 ante.

8 See para 744 post.

9 See para 739 note 17 post.

10 See the discussion of promissory estoppel at paras 1030-1035 post; and see also the discussion of waiver at para 1028 post.

11 *Combe v Combe*[1951] 2 KB 215, [1951] 1 All ER 767, CA; *Argy Trading Development Co Ltd v Lapid Developments Ltd*[1977] 3 All ER 785, [1977] 1 WLR 444 (failure to continue insurance; for other points see note 4 supra). See further para 1031 post; *Burton v Brook* (1956) 6 DLR (2d) 464 (BC).

12 See para 744 post.

13 See *The Pioneer Container*[1994] 2 AC 324 at 335, sub nom *The Pioneer Container, KH Enterprises (Cargo Owners) v Pioneer Container (Owners)*[1994] 2 All ER 250 at 255-256, PC, per Lord Goff of Chieveley.

14 See paras 718-726 ante.

15 See *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*[1975] AC 154 at 167, [1974] 1 All ER 1015 at 1019-1020, PC, per Lord Wilberforce (delivering the majority judgment).

16 See para 747 note 15 post.

17 See para 734 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(i) The Requirement of Consideration/728. Meaning of 'consideration'.

## 728. Meaning of 'consideration'.

Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request<sup>1</sup>. It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise<sup>2</sup>.

Thus, consideration for a promise may consist in either<sup>3</sup> some benefit conferred on the promisor<sup>4</sup>, or detriment suffered by the promisee<sup>5</sup>, or both<sup>6</sup>. On the other hand, that benefit or detriment can only amount to consideration sufficient to support a binding promise where it is causally linked to that promise<sup>7</sup>. Furthermore, consideration must be distinguished from both a motive and a condition<sup>8</sup>.

Consideration may be executed or executory<sup>9</sup>, but it may not be past<sup>10</sup>; it need not be adequate<sup>11</sup>, but it must be of some value<sup>12</sup>; and it must move from the promisee<sup>13</sup>.

1 *Currie v Misa* (1875) LR 10 Exch 153 at 162, Ex Ch (affd sub nom *Misa v Currie* (1876) 1 App Cas 554); *Fleming v Bank of New Zealand* [1900] AC 577 at 586, PC; and see *Edgeware Highway Board v Harrow District Gas Co* (1874) LR 10 QB 92; *Williamson v Clements* (1809) 1 Taunt 523. If the consideration is illegal or immoral, the contract is void: see *Shackell v Rosier* (1836) 2 Bing NC 634; and para 836 et seq post.

2 *Bailey v Croft* (1812) 4 Taunt 611 (agreement by A and B in consideration that C, who was not interested, would join as a party); *Alhusen v Prest* (1851) 6 Exch 720 (withdrawal of proceedings against A in consideration of B promising to pay A's debt); *Haigh v Brooks* (1839) 10 Ad & El 309; affd sub nom *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch (guarantee); *Ambrose v Rowe* (1684) 2 Show 421 (retainer of attorney on behalf of third person, with promise to pay his fees); *Hart v Langfitt* (1702) 2 Ld Raym 841 (third person nursed at defendant's request); *Re Viscount Mountgarret, Ingilby v Talbot* (1913) 29 TLR 325 (promise to defray cost of building operations; effect of death of promisor when work partly executed on liability of estate for work contracted for before death). Cf *Re Cory, Kinnaird v Cory* (1912) 29 TLR 18 (expenses incurred in consequence of promise by deceased of donations to charities: held, the promise created no contractual obligation and the estate was not liable); *Hohler v Aston* [1920] 2 Ch 420 (purchase of house for benefit of third person, by whom possession was taken at great expense); *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL (see para 749 post).

3 Consideration may consist in detriment to the promisee that is no benefit to the promisor (see eg para 734 note 1 post); but equally, it may consist in a benefit to the promisor that is no detriment to the promisee (*Bolton v Madden* (1873) LR 9 QB 55; *De La Bere v Pearson Ltd* [1908] 1 KB 280, CA: see para 736 note 10 post). See also the cases on compositions with creditors cited in para 1048 post. For further discussion of the notion of benefit and detriment see para 735 post.

4 See para 731 post.

5 See para 732 post.

6 In the usual case the consideration for a promise consists of both detriment to one party and benefit to the other party, these two being the same thing looked at from two different viewpoints.

7 At very least, it must be referable to the other party's promise: *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 (see paras 737 note 4, 741 note 9 post).

8 See para 729 post.

9 See para 733 post.

10 See para 739 post.

- 11 See para 736 post.
- 12 See para 735 post. Consideration may be nominal: see para 733 post.
- 13 See para 734 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(i) The Requirement of Consideration/729. Consideration and motive distinguished.

### **729. Consideration and motive distinguished.**

The consideration sufficient to support a binding promise<sup>1</sup> must be distinguished from a motive which induces a promise to be given. Whilst any valuable consideration will usually<sup>2</sup> form at least part of the motive inducing the promise, this will not necessarily be the case, as where the real motive is natural love and affection<sup>3</sup>, or to carry out the wishes of a testator<sup>4</sup>. Where there is such a motive which does not amount to consideration in the eyes of the law<sup>5</sup>, there would be a mere executory gift<sup>6</sup>, unless the promise were made by deed<sup>7</sup> or for some legally effective, albeit nominal, consideration<sup>8</sup>.

1 For the meaning of 'consideration' see para 728 ante.

2 But not necessarily: see eg *Bob Guinness Ltd v Salomonsen* [1948] 2 KB 42: see further para 741 note 4 post.

3 This does not amount to valuable consideration: see para 737 post.

4 Cf *Thomas v Thomas* (1842) 2 QB 851 (P's husband had expressed the wish that his widow should have the use of his house. Accordingly, D, his executor, agreed to allow her to occupy the house until her death or remarriage (1) 'in consideration of' her husband's wishes; (2) on payment by her of £1 per annum towards the ground rent and a promise to keep the premises in good and tenantable repair. For the points raised by this case see note 8 infra; and paras 730 notes 3, 9, 735 notes 4, 10, 737 note 6 post).

5 See para 737 post.

6 *Milroy v Lord* (1862) 4 De GF & J 264 at 274 per Turner LJ; and see further GIFTS.

7 See para 727 note 7 ante.

8 See eg *Thomas v Thomas* (1842) 2 QB 851 (the payment of the £1 per annum etc: see note 4 supra); *Harding v Harding* (1972) 8 RFL 1, 28 DLR (3d) 358 (BC). As the Court of Common Pleas explained in *Pinne's Case* (1602) 5 Co Rep 117a, 'the gift of a horse, hawk or robe, etc' is good consideration. As to adequacy of consideration see para 736 post. Where a nominal consideration, eg a peppercorn, is sufficient (see para 733 post), it is irrelevant at common law that the recipient does not like pepper and throws away the peppercorn. This seems to be the origin of the 'peppercorn rent'; the parties would bargain for some everyday item with the intention of investing what was really a gift with the indicia of contract.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(i) The Requirement of Consideration/730. Consideration and condition distinguished.

### 730. Consideration and condition distinguished.

The consideration sufficient to support a binding promise<sup>1</sup> must be distinguished from certain types of condition:

- 61 (1) the promise made by a party may be subject to a condition precedent<sup>2</sup>; and in those circumstances the consideration which 'buys' the promise must be distinguished from the condition to which that promise is made subject<sup>3</sup>;
- 62 (2) the alleged consideration may in fact merely be the condition on which a gift is to be made<sup>4</sup>. A promise to make a 'gift' in a certain event cannot be 'accepted' so as to constitute a binding contract unless (a) the parties intend a contract<sup>5</sup>; and (b) that event involves some detriment to the 'donee' and/or benefit to the 'donor' sufficient to amount to consideration;
- 63 (3) it may be difficult to distinguish between a contractual licence<sup>6</sup> and a non-contractual licence<sup>7</sup>. Whilst the alleged consideration for a contract might always be merely a condition to which a gift is subject<sup>8</sup>, not every such condition is capable of amounting to consideration<sup>9</sup>.

1 For the meaning of 'consideration' see para 728 ante.

2 As to conditions precedent see paras 670 ante, 962-965 post.

3 See eg *Thomas v Thomas* (1842) 2 QB 851 ('so long as she should continue ... unmarried'); *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA (provided the user 'contracts the increasing epidemic influenza' etc). Cf *Robshaw Bros Ltd v Mayer* [1957] 1 Ch 125, [1956] 3 All ER 833; *Doyle v East* [1972] 2 All ER 1013, [1972] 1 WLR 1080; and see SPECIFIC PERFORMANCE.

4 See eg *Re Hudson, Creed v Henderson* (1885) 54 LJ Ch 811 (promise of £20,000 'for liquidation of chapel debts'); *Robshaw Bros Ltd v Mayer* [1957] 1 Ch 125, [1956] 3 All ER 833; and see SPECIFIC PERFORMANCE vol 44(1) (Reissue) paras 907, 926; *Dickinson v Abel* [1969] 1 All ER 484, [1969] 1 WLR 295; and see INCOME TAXATION vol 23(1) (Reissue) para 567. The difficulty which may occur in distinguishing between consideration and a conditional gift is illustrated not only by the cases cited in notes 6-7 infra, but also by the differing opinions of the Court of Appeal in *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793 (decided on a restraint of trade point: see generally para 866 post). As to nominal consideration see para 733 post.

5 See para 718 et seq ante.

6 See eg *Gore v Van der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA (as to intention to create legal relations see para 722 note 12 ante). As to contractual licences see generally para 981 post; *Hurst v Picture Theatres Ltd* [1915] 1 KB 1, CA; and LANDLORD AND TENANT.

7 See eg *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258, CA (as to lack of intention to create legal relations see para 722 note 11 ante); *Bunting v Thorne RDC* [1956] CLY 4890; and cf the cases cited in note 4 supra. A bare licence is revocable at any time: *R v Horndon-on-the-Hill Inhabitants* (1816) 4 M & S 562; and see LANDLORD AND TENANT. Cf as to imperfect gifts: *Wycherley v Wycherley* (1763) 2 Eden 175; and GIFTS vol 52 (2009) para 267 et seq. A bare licence or gift may be conditional, as where it is subject to an exclusion clause: see eg *Wilkie v London Passenger Transport Board* supra; *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409, [1957] 1 All ER 35, CA; and see further paras 814, 818 post.

8 See eg the cases cited in note 7 supra. The matter may be put in the form of asking whether there is an intention to create legal relations: see para 722 ante. Of course, it is always possible that the agreement contains both a condition and consideration: see the cases cited in note 3 supra.

9 Because it may not be a benefit to the promisor or a detriment to the promisee: for the definition of consideration see para 728 ante. Thus, it is difficult to see what consideration was given by the pass holder (Mrs

G) in *Gore v Van der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA (Mrs G was apparently merely given a limited benefit but beyond stating that there was consideration, the Court of Appeal did not discuss this point); and see the examples given by Lord Greene MR in *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258 at 260, CA. But see *Thomas v Thomas* (1842) 2 QB 841; and para 729 note 4 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(i) The Requirement of Consideration/731. Benefit to the promisor.

### **731. Benefit to the promisor.**

Examples of valuable consideration consisting in some right, interest, profit, or benefit accruing to the promisor are: the assignment of a contract<sup>1</sup>; the giving of employment<sup>2</sup>; permitting goods to remain in the promisor's possession<sup>3</sup>; the guarantee of an overdraft<sup>4</sup>; the substitution of one agreement for another<sup>5</sup>; an undertaking to assign<sup>6</sup>; an undertaking to supply goods<sup>7</sup>; the sale of an alleged claim<sup>8</sup>; the increased sale of an advertised article<sup>9</sup> or of a newspaper<sup>10</sup>; the deposit of a store warrant with a bank<sup>11</sup>; an agreement to supply electric light at a fixed rate<sup>12</sup>; an agreement to accept reduced salary during war time, the previous rate to be restored at the termination of war<sup>13</sup>; an agreement that a product warranted by a party should be used by the other party's contractors<sup>14</sup>; preparing scripts for a political broadcast<sup>15</sup>; a lock-out agreement<sup>16</sup>.

1 *Price v Seaman* (1825) 4 B & C 525; and see para 757 post.

2 *Hartley v Cummings* (1847) 5 CB 247; *Mumford v Gething* (1859) 7 CBNS 305.

3 *Gay v Hall* (1848) 5 Dow & L 422.

4 *Watson v Allcock* (1853) 4 De GM & G 242.

5 *Woolliscroft v Watson* (1858) 31 LTOS 13. See also *Rimar Pty Ltd v Pappas* (1986) 64 ALR 9, Aust HC (assignment of contract to a bankrupt).

6 *Howard v Lovegrove* (1870) LR 6 Exch 43.

7 *Great Northern Rly Co v Witham* (1873) LR 9 CP 16.

8 *McGreevy v Russell* (1886) 56 LT 501, PC.

9 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA.

10 *De La Bere v Pearson Ltd* [1908] 1 KB 280, CA.

11 *Fleming v Bank of New Zealand* [1900] AC 577, PC.

12 *Metropolitan Electric Supply Co Ltd v Ginder* [1901] 2 Ch 799.

13 *Raggow v Scougall & Co* (1915) 31 TLR 564, DC.

14 *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854, [1951] 2 All ER 471. See also the other cases on collateral contracts cited in para 753 post.

15 *Evans v British Broadcasting Corp and Independent Broadcasting Authority* (1974) Times, 27 February, CA.

16 *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961, [1994] 1 WLR 327, CA; and see para 641 ante.

## **UPDATE**

### **731 Benefit to the promisor**

NOTE 16--The remedy available to the promisee in the event of a breach of an exclusivity agreement is damages only, as such an agreement does require the sale of the property concerned to the promisee: *Tye v House* [1998] 76 P & CR 188.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(i) The Requirement of Consideration/732. Detriment to the promisee.

### **732. Detriment to the promisee.**

Examples of valuable consideration consisting in some forbearance, detriment, loss, or responsibility suffered or undertaken by the promisee are: the surrender of a security<sup>1</sup>, of a right to charge item charges by a solicitor<sup>2</sup>, of an interest in a business<sup>3</sup>, of a claim to assignment of shipping documents<sup>4</sup>, or of a lease<sup>5</sup>; the withdrawal of opposition to a sale<sup>6</sup>; entering into a contract with a third party<sup>7</sup>; the submission of accounts to inspection<sup>8</sup>; going to a particular place<sup>9</sup>; the regular use of an advertised article<sup>10</sup>; the payment of money<sup>11</sup>, or of a high rate of interest<sup>12</sup>; an undertaking to pay money<sup>13</sup>; the submission to the risk of having to pay money<sup>14</sup>; a promise to render future services<sup>15</sup>; enlistment in the army<sup>16</sup>; remaining unmarried<sup>17</sup>; the giving of confidential information for a particular purpose<sup>18</sup>; the waiving of interest on a loan as an inducement to a company to carry on business<sup>19</sup>; giving up a right to prove in bankruptcy<sup>20</sup>; the paying by the payee of a cheque into his account and drawing by him of cheques against it at the request of the drawer<sup>21</sup>; the acceptance of a cheque in place of legal tender<sup>22</sup>; giving up rent-controlled premises<sup>23</sup>.

1 *Chadwick v Sprite* (1601) Cro Eliz 821; *Meredith v Chute* (1702) 2 Ld Raym 759; *Walker v Taylor* (1834) 6 C & P 752; *Lyth v Ault* (1852) 7 Exch 669.

2 *Emmens v Elderton* (1853) 4 HL Cas 624.

3 *Cheadle v Proctor* (1868) 19 LT 289.

4 *Chartered Bank of India, Australia and China v Henderson* (1874) LR 5 PC 501.

5 *Foster v Wheeler* (1888) 38 ChD 130, CA.

6 *Galton v Emuss* (1844) 1 Coll 243.

7 *Crosbie v McDoual* (1806) 13 Ves 148; *Skidmore v Bradford* (1869) LR 8 Eq 134; *Hohler v Aston* [1920] 2 Ch 420; *Penn v Bristol and West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356, CA. As to collateral contracts see para 753 post.

8 *March v Culpepper* (1627) Cro Car 70.

9 *Harvey v Johnston* (1848) 6 CB 295.

10 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA.

11 *Henrick v De Tasses* (1642) 1 Roll Abr 593, pl 6; *Anon* (1688) 2 Vent 45; *Taylor v Manners* (1865) 1 Ch App 48; *Ashwell and Nesbit Ltd v Stanton* (1900) 16 TLR 399.

12 See *Egg v Craig* (1903) 89 LT 41.

13 *Thomas v Thomas* (1842) 2 QB 851.

14 *Edgeware Highway Board v Harrow Gas Co* (1874) LR 10 QB 92.

15 *Re Casey's Patents, Stewart v Casey* [1892] 1 Ch 104, CA.

16 *Budgett v Stratford Co-operative and Industrial Society Ltd* (1916) 32 TLR 378; *Davies v Rhondda UDC* (1917) 87 LJB 166, CA. Cf *Sanderson v Workington Borough Council* (1918) 34 TLR 386 (promise to mobilised member of the territorial army).

17 *Wild v Harris* (1849) 7 CB 999; *Millward v Littlewood* (1850) 5 Exch 775. As to promises to marry see para 742 post.

18 *Mechanical and General Inventions Co Ltd and Lehwess v Austin and Austin Motor Co Ltd* [1935] AC 346, HL.

19 *Ledingham v Bermejo Estancia Co Ltd* [1947] 1 All ER 749.

20 *Re Cuthbert* [1936] 1 All ER 342.

21 *Cole v Milsome* [1951] 1 All ER 311.

22 *Pollway Ltd v Abdullah* [1974] 2 All ER 381, [1974] 1 WLR 493, CA. As to the effect of accepting a negotiable instrument in payment see paras 951-955 post.

23 *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(i) The Requirement of Consideration/733. Executory and executed consideration.

### **733. Executory and executed consideration.**

Consideration is said to be 'executory' when it consists of a promise to do or forbear from doing some act in the future; and it is said to be 'executed' when it consists in some act or forbearance completed at earliest when the promise becomes binding<sup>1</sup>. Thus, valuable consideration may be provided by either of the following: (1) mutual promises<sup>2</sup>, which will give rise to a bilateral contract<sup>3</sup>; or (2) a promise in return for an act<sup>4</sup>, in which case there will be a unilateral contract<sup>5</sup>.

When a promise is performed, it is said to be 'executed'<sup>6</sup>; but, where there is never any promise on one side nor any act to be performed, care must be taken to distinguish executed consideration from past consideration<sup>7</sup>.

This willingness of English law to enforce an executory promise has sometimes been utilised to make good the fact that the law of gifts will not enforce an executory gift<sup>8</sup>, by introducing a nominal (token) consideration into what would otherwise be a gift<sup>9</sup>. In such cases, the nominal consideration is clearly not the motive for making the contract<sup>10</sup>, which may lead to some difficulty in distinguishing gifts from contracts<sup>11</sup> and has provoked some special statutory treatment where the result might be inconvenient<sup>12</sup>. At common law, however, the distinction seems to turn not on the presence or absence of nominal consideration but on the intention of the parties<sup>13</sup>; the fortuitous presence of nominal consideration will not prevent an informal gratuitous promise from being a gift<sup>14</sup>, whereas the deliberate inclusion of a nominal consideration, such as a peppercorn, seems likely to make the transaction a contract<sup>15</sup>.

1 See generally para 606 notes 11, 13 ante.

2 These were accepted as good consideration at the end of the sixteenth century: see eg *Peeke v Redman* (1552) 2 Dyer 113a; *Joscelin v Shelton* (1557) 3 Leon 4; *Manwood v Burston* (1586) 2 Leon 203.

3 As to bilateral contracts see generally para 606 ante.

4 See eg the reward cases: see para 639 ante.

5 As to unilateral contracts see generally para 606 ante.

6 See para 606 ante.

7 See para 739 post.

8 *Milroy v Lord* (1862) 4 De GF & J 264, CA in Ch; and see GIFTS vol 52 (2009) PARA 267 et seq.

9 See eg *Thomas v Thomas* (1842) 2 QB 851 (lease for life on payment of £1 per annum towards a certain ground rent); *Turner v Forwood* [1951] 1 All ER 746, [1951] WN 189, CA (assignment of debt for 10 shillings); *Mountford v Scott* [1975] Ch 258, [1975] 1 All ER 198, CA (£1 option to buy house for £10,000; as to options see para 640 ante). Distinguish a nudum pactum: see para 727 note 3 ante.

10 See para 729 ante.

11 As where there is a conditional gift: see para 730 ante.

12 See eg the Land Charges Act 1972 s 4(6) (as amended) ('money or money's worth'); and *Midland Bank Trust Co Ltd v Green* [1981] AC 513 at 523, [1981] 1 All ER 153 at 159-160, HL, per Lord Wilberforce. See also the Trustee Act 1925 s 13; the Law of Property Act 1925 s 173; the Inheritance (Provision for Family and Dependents) Act 1976 ss 10(2)(b), 11(2)(c); the Insolvency Act 1986 ss 238, 239, 423.

- 13 As to the intention to create legal relations see para 718 et seq ante.
- 14 See the case cited in note 8 supra.
- 15 See the cases cited in note 9 supra.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(i) The Requirement of Consideration/734. Consideration must move from the promisee.

### **734. Consideration must move from the promisee.**

The consideration necessary to make a promise binding at the suit of the promisee must move from that promisee<sup>1</sup> or, perhaps, from his joint promisee<sup>2</sup>; that is to say, it must be given by him as an equivalent for the promise<sup>3</sup> made by the promisor<sup>4</sup>; and it is not sufficient that the promisee is merely a near relation of the party from whom the consideration moves<sup>5</sup>. This rule may be bound up with the doctrine of privity of contract<sup>6</sup>; or it may be entirely independent of the privity rule<sup>7</sup>.

Negotiable instruments are an exception; where valuable consideration has at any time been given for a bill<sup>8</sup>, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time<sup>9</sup>. Moreover, for historical reasons, there may also be an anomalous exception in the case of marriage settlements<sup>10</sup>.

1 But it need not move to the promisor, eg guarantees: see the cases cited in para 648 notes 10-11, 14-16 ante. See also *Re Wyvern Developments Ltd* [1974] 2 All ER 535, [1974] 1 WLR 1097.

2 See *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] ALR 385 at 405, 119 CLR 460 at 493, Aust HC, per Windeyer J (the promise is made to them collectively. It must, of course, be supported by consideration, but that does not mean consideration furnished by them separately. It means consideration given on behalf of them both and therefore moving from both of them. In such a case the promise of the promisor is not gratuitous; and, as between him and the joint promisees, it matters not how they were able to provide the price of his promise to them); cited with approval by Lord Simon in *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 180, [1974] 1 All ER 1015 at 1030-1031, PC. As to privity see para 749 note 2 post; as to joint promises see para 1079 et seq post.

3 In the case of a unilateral contract, the consideration provided by the promisee will be not a promise, but an act: as to unilateral contracts see generally para 606 ante.

4 *Thomas v Thomas* (1842) 2 QB 851 per Patteson J; see also *Osborne v Rogers* (1667) 1 Wms Saund 264 (money paid by plaintiff at the request of defendant); *Price v Easton* (1833) 4 B & Ad 433 (promise to pay money earned by promisee's debtor); *Tipper v Bicknell* (1837) 3 Bing NC 710 (acceptance of bills); *Webb v Rhodes* (1837) 3 Bing NC 732 (preparation of draft lease, assented to by proposed lessee); *Evans v Hooper* (1875) 1 QBD 45, CA (subscription to mutual insurance policy by manager on behalf of members); *Dashwood v Jermyn* (1879) 12 ChD 776 (followed in *Ashwell and Nesbit Ltd v Stanton* (1900) 16 TLR 399 (verbal agreement by contractor to complete work by certain time, upon faith of which the other party expended money)); *Tweddle v Atkinson* (1861) 1 B & S 393 (agreement to provide marriage portion for plaintiff's wife, plaintiff not being a party thereto); *Barry v Barry* (1891) 28 LR Ir 45 (permission given to take possession of property on promise to pay legacy secured on the property); *Watt v Callard* (1908) Times 27 November (remaining director of company); *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL (price maintenance agreement where no consideration moved from plaintiffs, such consideration being given by a third person); *Schmaling v Tomlinson* (1815) 6 Taunt 147; *McInerny v Lloyds Bank Ltd* [1973] 2 Lloyd's Rep 389 (banker's commercial credit; affd on other grounds [1974] 1 Lloyd's Rep 246, CA); *Coghlan v SH Lock (Australia) Ltd* [1988] LRC (Comm) 492, PC (guarantee by directors of group indebtedness). Where the consideration moves from two persons it is not necessary that both should be joined as plaintiffs in an action brought to enforce a promise made to one of them: *Jones v Robinson* (1847) 1 Exch 454.

5 *Tweddle v Atkinson* (1861) 1 B & S 393; *Cavalier v Pope* [1906] AC 428, HL (injury to wife of tenant through breach by landlord of agreement to execute repairs); *Malone v Laskey* [1907] 2 KB 141, CA (claim by wife of sub-tenant against superior landlord); overruled on negligence point in *AC Billing & Sons Ltd v Riden* [1958] AC 240, [1957] 3 All ER 1, HL; *Cameron v Young* [1908] AC 176, HL (claim by wife against husband's landlord).

6 As the two rules usually lead to the same result, there is a judicial tendency to use them interchangeably: see eg *Tweddle v Atkinson* (1861) 1 B & S 393 (based on consideration rule); *Price v Easton* (1833) 4 B & Ad 433 (based on privity rule). As to the privity rule see para 748 et seq post.

7 See *Kepong Prospecting Ltd v Schmidt* [1968] AC 810, PC (Malaysian law did not have the English consideration rule; but held to have kept the English privity rule).

8 By the Bills of Exchange Act 1882 s 27(1), valuable consideration is extended to include any antecedent debt or liability (as to past consideration see further para 739 note 17 post). It is clear, however, that the consideration must in any event move from the promisee (the payee of the cheque): *Pollway v Abdullah* [1974] 2 All ER 381 at 384-385, [1974] 1 WLR 493 at 497, CA, per Roskill LJ. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1478 et seq.

9 See the Bills of Exchange Act 1882 s 27(2); and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1478 et seq.

10 See para 760 head (3) post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(ii) What amounts to Consideration/735. The general rule.

## (ii) What amounts to Consideration

### 735. The general rule.

Quite early, the courts decided that they would not audit the bargain made between the parties; the consideration<sup>1</sup> necessary to support a promise need not be adequate but it must be of some value, albeit nominal<sup>2</sup>.

Furthermore, the courts have rejected the argument that any act or promise, regardless of content, should be enforceable in the interests of morality<sup>3</sup>; and have affirmed that a promisee can only enforce a promise if in return for it he gave something of value in the eyes of the law<sup>4</sup>. Whilst there is a general insistence that consideration must be of some value (sufficient)<sup>5</sup>, there seems to be no single theory which explains all the cases in which the consideration has been held to be insufficient<sup>6</sup>. Moreover there are several cases where the consideration appears to be based on a legal fiction or presumed, for instance: bailments<sup>7</sup>; money held for another<sup>8</sup>; maintenance agreements<sup>9</sup>; 'gifts' of onerous property<sup>10</sup>; marriage settlements<sup>11</sup>; compositions with creditors<sup>12</sup>; payment by a third party of a lesser sum in satisfaction of a greater<sup>13</sup>; situations<sup>14</sup> which might today lead to an action in tort for negligent misstatement<sup>15</sup>; some of the cases on performance of an existing contractual duty owed to a third party<sup>16</sup>; agreement to accept a lesser rent under a rent review clause<sup>17</sup>; and, it has been suggested, forbearance to sue<sup>18</sup>.

It is not, however, clear whether the benefit or detriment required for valuable consideration must be factual or legal. The terms 'benefit' and 'detriment' are used in two different senses: (1) any act, forbearance or promise which has economic value, that is, there is consideration only if a benefit is in fact obtained, or a detriment is in fact suffered<sup>19</sup>; (2) an act, forbearance or promise the performance of which is not already legally due from the promisee, that is, factual benefit or detriment is disregarded in favour of a notion of legal benefit or detriment<sup>20</sup>. Under head (2) above, a factual benefit or detriment will not always amount to a legal benefit or detriment; and a legal benefit or detriment will not always amount to a factual benefit or detriment. Nor do the courts consistently adopt the factual or legal approach to consideration<sup>21</sup>.

1 For the meaning of 'consideration' see para 728 ante.

2 As to nominal consideration see para 733 ante; and as to adequacy of consideration see para 736 post.

3 See para 737 post.

4 *Thomas v Thomas*(1842) 2 QB 851 at 859 per Patteson J. This may be an explanation of *White v Bluett* (1853) 23 LJ Ex 36 (see para 740 note 1 post). Cf the Insolvency Act 1986 s 339; and see further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 653 et seq.

5 See para 738 post.

6 Compare eg the reasons for refusing to enforce informal executory gifts (see para 733 ante) and the reasons for refusing to recognise the performance of existing duties (see paras 745-747 post) as consideration.

7 See para 744 post.

8 See para 743 post.

9 See eg *Ward v Byham*[1956] 2 All ER 318, [1956] 1 WLR 496, CA; *Williams v Williams*[1957] 1 All ER 305, [1957] 1 WLR 148, CA. For a possible explanation of these cases see para 745 note 3 post.

10 See eg (1) a promise to give away a lease if the donee performed the donor's covenants (*Thomas v Thomas*(1842) 2 QB 851; *Price v Jenkins*(1877) 5 ChD 619, CA; *Johnsey Estates Ltd v Lewis & Manley (Engineering) Ltd* (1987) 54 P & CR 296, CA); (2) a promise to give away partly-paid shares if the donee promises to pay any further calls (*Cheale v Kenward* (1858) 3 De G & J 27).

11 See para 760 post.

12 See para 1048 post.

13 See para 1045 note 17 post.

14 See eg *De La Bere v Pearson Ltd*[1908] 1 KB 280, CA.

15 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[1964] AC 465, [1963] 2 All ER 575, HL; para 609 ante; and NEGLIGENCE vol 78 (2010) PARA 14.

16 See the cases cited in para 746 note 6 post.

17 *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd*(1983) Times, 8 March, [1983] Com LR 158, CA (landlord mistakenly proposed a reduced rent under a rent review clause; and the tenant accepted. Held: tenant gave consideration by foregoing the right to suggest any other figure under the rent review clause, which might cause inconvenience, uncertainty and costs).

18 *Bob Guinness Ltd v Salomonsen*[1948] 2 KB 42 at 47 per Denning J. As to forbearance to sue see para 741 post.

19 There may be a factual, but no legal, benefit in the cases dealing with agreements to comply with legal obligations: *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd*[1989] QB 833, [1989] 1 All ER 641 (party providing only factual benefit lost on grounds of economic duress: see para 711 ante); and see para 738 note 13 post.

20 There would appear to be a legal, but no factual, benefit in the cases cited in para 728 note 3 ante.

21 Perhaps a modern justification for the piecemeal development described in the text may be found in the concept of good faith dealing: see para 613 ante.

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### 736. Adequacy of consideration.

At both common law and equity<sup>1</sup>, the courts do not generally concern themselves with the adequacy of the consideration; that is, they make no attempt to audit the bargain made by the parties to see if it is a fair one<sup>2</sup>. For instance, the following have been held to amount to sufficient consideration, though seemingly inadequate: work or labour, whether mental or manual<sup>3</sup>, and however small in degree<sup>4</sup>; permission to weigh boilers for a promise to return them<sup>5</sup>; to give £50 'if you will come to my house'<sup>6</sup>; the act of executing a deed in return for a promise to pay money, although the deed was void<sup>7</sup>; to give up a piece of paper without reference to its contents<sup>8</sup>; to show a person a document<sup>9</sup>, or have the right to publish it<sup>10</sup>; maintenance agreements<sup>11</sup>; an option granted for a 'token consideration' to buy a property for £10,000<sup>12</sup>; a promise to perform the agreed services in a slightly different manner<sup>13</sup>.

Whilst the courts are not substantively interested in the adequacy of the consideration, the fact that a contracting party pays too much or too little may be relevant for some other purposes. At common law, it may be evidence of duress<sup>14</sup> or mistake<sup>15</sup>; or it may induce the court to imply a warranty<sup>16</sup>. In equity, it may give grounds for setting aside a bargain on the basis of fraud<sup>17</sup>, undue influence<sup>18</sup> or that it is unconscionable<sup>19</sup>; or it may lead to a refusal to grant specific performance<sup>20</sup>. Furthermore, a merely nominal consideration does not prevent a contract or settlement from being regarded as voluntary so far as third persons are concerned<sup>21</sup>.

1 See eg *Cheale v Kenward* (1858) 3 De G & J 27; *Townend v Toker* (1866) 1 Ch App 446. See also *Haigh v Brooks* (1839) 10 Ad & El 309 (affd sub nom *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch); *Kearns v Durell* (1848) 6 CB 596; *Pilkington v Scott* (1846) 15 M & W 657 at 660 per Alderson B; *Bolton v Madden* (1873) LR 9 QB 55; *Middleton v Brown* (1878) 47 LJ Ch 411, CA; *Stindt v Roberts* (1848) 2 Saund & C 212; *Gravelly v Barnard* (1874) LR 18 Eq 518 (promise not to carry on business within limits in consideration of employment during employer's pleasure); *Harrison v Guest* (1860) 8 HL Cas 481 (sale of estate for inadequate consideration); *South Eastern Rly Co v National Telephone Co Ltd* [1908] 2 Ch 514, CA (consent of plaintiffs to laying of cable under the surface of the roadway carried by a bridge across the railway, in consideration of annual rental, defendants having in fact statutory powers); *Gaumont-British Picture Corp Ltd v Alexander* [1936] 2 All ER 1686 (determination of all matters in contract left by one party to discretion of the other).

2 *Gaumont-British Picture Corp Ltd v Alexander* [1936] 2 All ER 1686. See also *Pilkington v Scott* (1846) 15 M & W 657 (no express promise by plaintiffs to employ workmen but certain terms of employment agreed; held to be some consideration for agreement by workmen and court would not inquire into adequacy of it).

3 *Grafton v Armitage* (1845) 2 CB 336.

4 *Sturlyn v Albany* (1587) Cro Eliz 67: see *Wilkinson v Oliveira* (1835) 1 Scott 461; and also 1 Selwyn's NP (13th Edn) 55, cited with approval in *Laythoarp v Bryant* (1836) 3 Scott 238 at 250 per Tindal CJ, and in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 at 271, CA, per Bowen LJ.

5 *Bainbridge v Firmstone* (1838) 8 Ad & El 743; *Mansfield Importers and Distributors Ltd v Casco Terminals Ltd* [1971] 2 Lloyd's Rep 73 (BC). As to bailment see further para 744 post.

6 *Gilbert v Ruddeard* (1608) 3 Dyer 272b, n. Cf *Denton v Great Northern Rly Co* (1856) 5 E & B 860.

7 *Westlake v Adams* (1858) 5 CBNS 248 (this decision may also be explicable on grounds of compromise: see para 740 note 8 post). See also *Smith v Smith* (1863) 13 CBNS 418 (promise to give up possession of a will, which was subsequently treated as invalid, in exchange for promissory note securing legacy); *Begbie v Phosphate Sewage Co* (1875) LR 10 QB 491; affd (1876) 1 QBD 679, CA (purchase of right to use patent with knowledge that right did not exist).

8 *Haigh v Brooks* (1839) 10 Ad & El 309; affd sub nom *Brooks v Haigh* (1840) 10 Ad & El 323 at 334, Ex Ch, opinion of whole court other than Maule B. But see *Foster v Dawber* (1851) 6 Exch 839. Cf *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87, [1959] 2 All ER 701, HL.

9 *Sturlyn v Albany* (1587) Cro Eliz 67; *March v Culpepper* (1627) Cro Car 70.

10 *De La Bere v Pearson Ltd* [1908] 1 KB 280, CA. Whilst just explicable in terms of consideration (see para 728 note 3 ante), it may be that today such a claim would sound better in the tort of negligent misstatement: see para 735 notes 14-15 ante.

11 See the cases cited in para 735 note 9 ante.

12 *Mountford v Scott* [1975] Ch 258, [1975] 1 All ER 198, CA (as to options see para 640 ante; and as to nominal consideration see para 733 ante).

13 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA (see para 747 note 14 post); distinguished in *Re Selectmove Ltd* [1995] 2 All ER 531, [1995] 1 WLR 474, CA.

14 As to duress see paras 710-711 ante.

15 As to mistake see para 703 et seq ante.

16 As to implied terms see generally para 778 et seq post.

17 *Redgrave v Hurd* (1881) 20 ChD 1, CA; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 812 et seq.

18 As to undue influence see para 712 et seq ante.

19 *Fry v Lane, Re Fry, Whittet v Bush* (1888) 40 ChD 312; and see EQUITY vol 16(2) (Reissue) para 429.

20 *Falcke v Gray* (1859) 4 Drew 651; and see SPECIFIC PERFORMANCE vol 44(1) (Reissue) para 868.

21 *Kelson v Kelson* (1853) 10 Hare 385; *Gully v Bishop of Exeter* (1830) 10 B & C 584.

Perhaps the decisions discussed in the text may be explicable on the basis of whether or not there were good faith dealings: para 613 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVITY/(1) CONSIDERATION/(ii) What amounts to Consideration/737. Moral obligation.

### **737. Moral obligation.**

Apart from the anomalous case of marriage settlements<sup>1</sup>, the modern rule<sup>2</sup> is that a moral obligation alone is no consideration<sup>3</sup>; consequently in the following examples there was held to be no enforceable contract. A mere moral obligation, such as to repay a benefit already received<sup>4</sup>, or to make financial provision for a lover seduced by the promisor on an agreement to sever the relationship and live apart<sup>5</sup>, or the desire of an executor to carry out the wishes of his testator<sup>6</sup>, is not valuable consideration; nor is natural love and affection arising from blood relationship between the parties<sup>7</sup>.

1 See para 760 post. As to marriage as consideration see para 742 post.

2 In the eighteenth century, Lord Mansfield sought to define consideration in terms of moral obligation: *Hawkes v Saunders* (1782) 1 Cowp 289; *Atkins and Uxor v Hill* (1775) 1 Cowp 284; *Trueman v Fenton* (1772) 2 Cowp 544; *Hyleing v Hastings* (1699) 1 Ld Raym 389. But all those cases concerned some pre-existing obligation which would have been binding but for some specific legal defect. They did not support a theory of general moral obligation but were exceptional cases and have remained such.

3 See the note to *Wennell v Adney* (1802) 3 Bos & P 249 which has been frequently cited.

4 *Eastwood v Kenyon* (1840) 11 Ad & El 438; *Thomas v Thomas* (1842) 2 QB 851; *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291.

5 *Beaumont v Reeve* (1846) 8 QB 483.

6 *Thomas v Thomas* (1842) 2 QB 851; *Re Cory, Kinnaird v Cory* (1912) 29 TLR 18; *Re Viscount Mountgarret, Ingilby v Talbot* (1913) 29 TLR 325.

7 *Holliday v Atkinson* (1826) 5 B & C 501; *Tweddle v Atkinson* (1861) 1 B & S 393. Natural love and affection which is sufficient to rebut the presumption of a resulting trust, or to defeat a claim of fraudulent conveyance, is sometimes called 'good' as distinguished from 'valuable' consideration. As to rebuttal of the presumption of a resulting trust see *Re Eykyn's Trusts* (1877) 6 ChD 115; and GIFTS vol 52 (2009) PARA 244; and as to transactions defrauding creditors see the Insolvency Act 1986 ss 423-425; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 663 et seq.

The concept of good faith dealings may be relevant to the cases discussed in the text: see para 613 ante.

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### **738. Value (sufficiency) of consideration.**

Whilst consideration need not be adequate it must be of some value<sup>1</sup>. It has been settled that the following are no consideration: past consideration<sup>2</sup>; a promise to do an act which is obviously impossible, or which has no legal effect<sup>3</sup>; a promise which does not involve any legal obligation<sup>4</sup>; or, possibly, a promise which is illegal<sup>5</sup> or void<sup>6</sup>. On the other hand, it has been held that the following might amount to valuable consideration: a compromise of a claim<sup>7</sup>; a forbearance to sue<sup>8</sup>; marriage<sup>9</sup>; or an acknowledgment that money is held for another<sup>10</sup>. In addition, there are a number of cases where the consideration would appear to be based on a legal fiction<sup>11</sup>, such as gratuitous bailments and undertakings<sup>12</sup>.

A matter which has caused some difficulty is whether performance of an existing obligation constitutes valuable consideration<sup>13</sup>. The following three situations must be distinguished: (1) an obligation imposed by law<sup>14</sup>; (2) an obligation imposed by contract with a third party<sup>15</sup>; (3) an obligation imposed by contract with the promisor<sup>16</sup>.

1 See para 735 ante. In the absence of any consideration, an action may lie in restitution in respect of any benefit conferred: see para 618 ante; RESTITUTION. At common law, nominal consideration may suffice: see para 733 ante.

2 See para 739 post.

3 *Kent v Prat* (1609) 1 Brownl 6 (surrender of estate at will); *Harvy v Gibbons* (1676) 2 Lev 161 (release of debts by servant of creditor); *Stuckley v Cook* (1671) 3 Rep Ch 70 (release of debt already released); *Kaye v Dutton* (1844) 7 Man & G 807 (release of all interest in property, reserving lien, by party whose sole interest was a lien); *Eddison v Rothery* (1864) 4 New Rep 538 (undertaking to retire from business as proctor by person who was not enrolled as a proctor). Where the promise rests on two considerations, one of which is impossible, this may be rejected and resort had to that which is possible: *Coulston v Carr* (1601) Cro Eliz 847; *Shackell v Rosier* (1836) 2 Bing NC 634. As to promises which are too vague or uncertain to form a consideration see para 672 ante. A contract which is initially impossible of performance is not necessarily void: see para 894 post.

4 *Burton v Great Northern Rly Co* (1854) 9 Exch 507 (A promised to carry on his railway line all such goods as might be presented to him; but later gave B notice that the arrangement would cease. Held: no contract); *Westhead v Sproson* (1861) 6 H & N 728 (a promise by A, at B's request, to supply such goods to C as he may require, and A may see fit to supply, is no consideration for a promise by B, because it binds A to nothing). See also *Provincial Bank of Ireland Ltd v Donnell* [1934] NI 33, CA.

5 *Nerot v Wallace* (1789) 3 Term Rep 17 at 23 per Ashhurst J. But perhaps the better view is that the invalidity of such agreements rests not on the lack of consideration, but on grounds of public policy: see para 841 et seq post. As to gambling chips see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 561, [1992] 4 All ER 512 at 518, HL, per Lord Templeman (chips worthless); but see *Crockfords Club Ltd v Mehta* [1992] 2 All ER 748, [1992] 1 WLR 355, CA (seeming to suggest that the chips were good consideration). When the customer gambles with the chips, there would be a contract, but it is null and void under the Gaming Act 1845: see para 867 post.

6 *Williams v Williams* [1957] 1 All ER 305 at 306, [1957] 1 WLR 148 at 150, CA, per Denning LJ (but the point was admitted in this case (at 308 and at 152)). The case was concerned with agreements to forbear from suing, as to which see para 741 post. See also para 740 note 12 post.

7 See para 740 post.

8 See para 741 post.

9 See para 742 post.

10 See para 743 post.



11 See para 735 notes 7-18 ante.

12 See para 744 post. Good faith dealings might provide a more comfortable explanation: see para 613 ante.

13 In performing an existing duty, the promisor suffers no legal detriment, since he was, quite apart from the promise, bound to do the act; but he may suffer a factual detriment, in that performance may be more onerous than the payment of damages. Similarly, the promisee obtains no legal benefit, though he may get a factual benefit in so far as an award of damages (1) might not be met; or (2) might not be as valuable as performance. For the distinction between legal and factual detriment and benefit see para 735 ante.

14 See para 745 post.

15 See para 746 post.

16 See para 747 post.

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### 739. Past and executed consideration.

A so-called 'past consideration', that is, something done by the promisee before the promise was made, may constitute a motive for the promise<sup>1</sup>, but it is not valuable consideration<sup>2</sup>. However, the courts do not take a strict chronological view, so that, provided the promises are part of one transaction, it does not matter in what order they were given<sup>3</sup>. The question whether consideration is past, or merely executed<sup>4</sup>, is essentially one of fact<sup>5</sup>.

An apparent exception to the rule is, that where services have been rendered by one person to another at his request, a subsequent promise to pay for those services can be enforced<sup>6</sup>. This is, perhaps, not a real exception to the rule stated above, for in such a case there may be an implied promise to pay for the service<sup>7</sup>, and the subsequent express promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered<sup>8</sup>.

There were, however, two common law exceptions to the rule that past consideration was no consideration. First, a person who was protected from liability on his promise by some provision of the common law or statute, might waive the benefit of that protection and render himself liable by making a fresh promise, although he received no new consideration for it<sup>9</sup>, as was the case with married women<sup>10</sup>, usury<sup>11</sup>, discharge from bankruptcy<sup>12</sup>, deed of composition<sup>13</sup> and minority<sup>14</sup>; and several such rules have now achieved statutory form<sup>15</sup>. Secondly, an existing debt formed a sufficient consideration for a negotiable security given by the debtor to the creditor on account of the debt, even if the security was payable on demand<sup>16</sup>; and this exception too has now been confirmed by statute<sup>17</sup>.

1 As to the distinction between consideration and motive see para 729 ante.

2 *Lampleigh v Brathwait* (1615) Hob 105, obiter (for the ratio of this case see note 6 infra); *Dent v Bennett* (1839) 4 My & Cr 269; *Hopkins v Logan* (1839) 5 M & W 241; *Jackson v Cobbin* (1841) 8 M & W 790; *Roscorla v Thomas* (1842) 3 QB 234; *Eastwood v Kenyon* (1840) 11 Ad & El 438; *Kaye v Dutton* (1844) 7 Man & G 807 at 815; *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 (existing debt not valuable consideration for assignment of life policy); *Bob Guinness Ltd v Salomonsen* [1948] 2 KB 42; *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA; *Astley Industrial Trust Ltd v Grimston Electric Tools Ltd* (1965) 109 Sol Jo 149; *Kepong Prospecting Ltd v Schmidt* [1968] AC 810 especially at 824, PC. Cf *Littlefield v Shee* (1831) 2 B & Ad 811.

3 *Thornton v Jenyns* (1840) 1 Man & G 166; *Tanner v Moore* (1846) 9 QB 1; *National Westminster Bank Ltd v Cullinane* [1983] LS Gaz R 153, CA. See also *Peerless Laundry and Cleaners Ltd v Neal* (1953) 8 WWR 309, [1953] 2 DLR 494, Man CA; *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355.

4 As to executed consideration see para 733 ante.

5 See eg *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA; *Goldshede v Swan* (1847) 1 Exch 154; *Arding v Buckton* (1956) 20 WWR 487, 6 DLR (2d) 586, BC CA; *Walsh v Westpac Banking Corp* (1992) 104 ACTR 30, Aust SC (blanks in form of guarantee filled in after its completion). The burden of proving that the consideration was not past is on the person seeking to enforce the promise: *Savage v Uwechia* [1961] 1 All ER 830, [1961] 1 WLR 455, PC.

6 *Lampleigh v Brathwait* (1615) Hob 105; *Bradford v Roulston* (1858) 8 ICLR 468; *Knowlman v Bluett* (1874) LR 9 Exch 307, Ex Ch; *Pao On v Lau Yiu Long* [1980] AC 614, [1979] 3 All ER 65, PC.

7 In any event, he will probably be entitled to a quantum meruit claim for his services: see paras 618 note 11 ante, 787 note 14; RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

8 *Kennedy v Broun* (1863) 13 CBNS 677 at 740; *Wilkinson v Oliveira* (1835) 1 Bing NC 490; *Re Casey's Patents, Stewart v Casey* [1892] 1 Ch 104 at 115, CA, per Bowen LJ. Several of the older cases on this subject were decided upon the ground that a moral obligation forms sufficient consideration for a promise. This doctrine, as has been already pointed out, is no longer recognised by English law (see para 737 ante); but the decisions in the cases to which reference is made may be supported upon the ground which is stated in the text, or, perhaps, on grounds of good faith dealings (see para 613 ante).

9 *Hawkes v Saunders* (1782) 1 Cowp 289 at 290 per Lord Mansfield CJ; *Wennall v Adney* (1802) 3 Bos & P 247 at 249 note (1); *Earle v Oliver* (1848) 2 Exch 71 at 90 per Parke B; *La Touche v La Touche* (1865) 3 H & C 576; see also *Hyleing v Hastings* (1699) 1 Ld Raym 389; *Trueman v Fenton* (1777) 2 Cowp 544.

10 A married woman, who had made a promise which in the then state of the law was not enforceable against her owing to her incapacity to contract was held liable on a subsequent promise to the same effect made after she had become a widow: *Lee v Muggeridge* (1813) 5 Taunt 36.

11 A person who gave bills by way of security for money borrowed at usurious interest at a time when the usury laws were in force (now repealed by the Usury Laws Repeal Act 1854), and renewed the bills after the repeal of those laws, was held liable on the bills although he received no fresh consideration for renewing them: *Flight v Reed* (1863) 1 H & C 703. This doctrine has no longer any application in the case of a promise made by a bankrupt who has obtained his discharge to pay a debt from which he has been released by proceedings in bankruptcy: see note 12 infra.

12 An order of discharge releases the bankrupt from all debts provable in bankruptcy with certain specified exceptions (see the Insolvency Act 1986 s 281 (as amended)); and a promise to pay a debt which has been released by the discharge is not binding on the bankrupt unless it is made for new consideration (*Heather & Son v Webb* (1876) 2 CPD 1): see further para 1067 et seq post; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 629 et seq.

13 A debt which has been discharged under a deed of composition is not a good consideration for a promissory note which is subsequently given to secure payment of a debt: *Re Hall, ex p Hall* (1835) 1 Deac 171. As to compositions see para 1048 post.

14 A ratification by a person of full age of a voidable contract made by him during minority is binding at common law: *Williams v Moor* (1843) 11 M & W 256. As to capacity to contract see para 630 ante.

15 See eg (1) the Limitation Act 1980 s 29(5), (6) (a promise to pay is not now a necessary ingredient in an acknowledgment in order to prevent a debt becoming barred by lapse of time or to revive a debt which has become barred); and LIMITATION PERIODS vol 68 (2008) PARA 1184; (2) the Companies Act 1985 s 36C (as added) (pre-incorporation contracts entered into before the company is registered personally enforceable against the person purporting to act for the company).

16 *Currie v Misa* (1875) LR 10 Exch 153, Ex Ch (affd sub nom *Misa v Currie* (1876) 1 App Cas 554, HL); *Stott v Fairlamb* (1883) 53 LJQB 47, CA. In such a case the negotiable security is equivalent to a conditional payment of the debt: see para 951 et seq post. Where goods have been paid for by a negotiable instrument which is still running, there is valuable consideration for a subsequent agreement that the negotiable instrument shall be paid out of moneys arising from the sale of the goods: *Walker v Rostron* (1842) 9 M & W 411. It has been held that the mere existence of a debt is not consideration for the giving of a security by the debtor to secure the debt (*Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 at 297), but there will be good consideration if there has been forbearance on the part of the creditors, which the court will readily infer (*Glegg v Bromley* [1912] 3 KB 474, CA). See also *Elkington v Cooke-Hill* (1914) 30 TLR 670 (debtor gave creditor a post-dated cheque for the amount of a prior advance secured by a promissory note, the creditor agreeing not to claim on the note during the currency of the cheque: held, the creditor could sue on the cheque on the ground that, although only a collateral security and not discharging the debtor's liability on the note, the agreement not to claim under the note was consideration for the cheque).

17 See the Bills of Exchange Act 1882 s 27(1)(b); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1479. It would appear that the 'antecedent debt or liability' must be that of the maker or negotiator of the instrument, and not that of a stranger; if it is that of a stranger, there must be consideration, such as forbearance to sue the stranger in consideration of the making of the instrument. As to forbearance to sue see generally para 741 post.

## UPDATE

### 739 Past and executed consideration

NOTE 2--See *Lady Manor Ltd v Fat Cat Café Bars Ltd* [2001] 33 EG 88 (information provided in cold calling letter was past consideration).

NOTE 15--Companies Act 1985 s 36C replaced by Companies Act 2006 s 51: see COMPANIES vol 14 (2009) PARA 66.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(ii) What amounts to Consideration/740. Compromises.

#### **740. Compromises.**

Where a party agrees to forbear from suing on a good claim<sup>1</sup> that may be valuable consideration for a promise, whether he agrees to forbear absolutely<sup>2</sup> or for a certain time<sup>3</sup> or for no specified time at all<sup>4</sup>. Moreover, even where the promise to forbear is for some reason invalid, the actual forbearance may be valuable consideration<sup>5</sup>.

A compromise of a disputed claim<sup>6</sup> which is honestly made, whether legal proceedings have been instituted or not, constitutes valuable consideration<sup>7</sup>, even if the claim ultimately turns out to be unfounded<sup>8</sup>. It is not necessary that the question in dispute should be really doubtful; it is sufficient if the parties in good faith believe it to be so, even if such belief is founded on a misapprehension of a clear rule of law<sup>9</sup>. Presumably, the position will be similar where the dispute is as to the facts, though a settlement based upon a mistake of fact might be void for mistake<sup>10</sup>. Certainly, the giving up of a contingent right to the costs of proceedings which are in the discretion of the court is consideration in law<sup>11</sup>.

However, the compromise of a claim will not constitute consideration where the claim is not made in good faith<sup>12</sup>, either because the plaintiff in the action knows that his claim is unfounded<sup>13</sup>, or where there is no sufficient evidence of any intended claim<sup>14</sup>, or where the plaintiff believes that he will succeed only because of the reluctance of the defendant to go into the witness box<sup>15</sup>. Nor will it do so where the agreement is illegal<sup>16</sup> or void<sup>17</sup>.

1 See eg *Fullerton v Provincial Bank of Ireland* [1903] AC 309, HL; *Shook v Munro and Davidson* [1947] OR 73, [1947] 3 DLR 271, Ont CA; *Tuaine v Wallis* [1965] NZLR 82 (NZ). Alternatively, one party may agree to forbear from exercising a right. It would seem that the position should be the same where a party agrees to forbear from exercising a liberty: *Dunton v Dunton* (1892) 18 VLR 114, Vict FC (undertaking by wife to conduct herself in a sober, orderly and virtuous manner); cf *Thorne v Motor Trade Association* [1937] AC 797, [1937] 3 All ER 157, HL. Apparently to the contrary is *White v Bluett* (1853) 23 LJ Ex 36 (son did not provide consideration for father's promise not to sue him on a promissory note by promising not to bore father with complaints); whilst this decision was given on the grounds that the son had no legal right to complain, he did have a liberty to do so; but the decision may be explicable on the grounds that that liberty had no economic value (see para 735 note 4 ante). Even if *White v Bluett* supra is authority for the general proposition that giving up a liberty is no consideration, possibly *Dunton v Dunton* supra shows that giving up an immoral liberty may be good consideration.

2 *Mapes v Sidney* (1624) Cro Jac 683; *Crowther v Farrer* (1850) 15 QB 677.

3 *Willatts v Kennedy* (1831) 8 Bing 5; *Morton v Burn* (1837) 7 Ad & El 19; *Board v Hoey* (1949) 65 TLR 43. See also *Payne v Wilson* (1827) 7 B & C 423; *Williams v Persaud* (1968) 12 WIR 261, Guyana CA; *Foot v Rawlings* [1963] SCR 197, 37 DLR (2d) 695, Can SC.

4 In which case, the forbearance is generally construed as being intended to continue for a reasonable time: see *Oldershaw v King* (1857) 2 H & N 517, Ex Ch; *Fullerton v Provincial Bank of Ireland* [1903] AC 309 at 313, HL, per Lord Macnaghten.

5 See para 741 note 4 post.

6 It was thought at one time that an agreement to forbear from suing only represented valuable consideration if the claim was well-founded because a party lost nothing by giving up a worthless right: *Jones v Ashburnham* (1804) 4 East 455.

7 *Bell v Galynski and A Kings Loft Extensions Ltd* [1974] 2 Lloyd's Rep 13, CA. On this basis, payment of a lesser sum may be a valid discharge for a greater (disputed) sum: *Ferguson v Davies* [1997] 1 All ER 315, CA, per Henry and Aldous LJ, where their Lordships found that there was no accord and satisfaction (see para 1045 post) because the debtor did not dispute the amount of the debt.

8 *Re AV and MEM Cole, Trustee in Bankruptcy v Public Trustee* [1931] 2 Ch 174; *Pooley v Lady Gilbred* (1612) 2 Bulst 41; *Bidwell v Catton* (1617) Hob 216; *Longridge v Dorville* (1821) 5 B & Ald 117; *Tempson v Knowles* (1849) 7 CB 651; *Crowther v Farrer* (1850) 15 QB 677; *Westlake v Adams* (1858) 5 CBNS 248; *Cook v Wright* (1861) 1 B & S 559; *Callisher v Bischoffsheim* (1870) LR 5 QB 449; *Ockford v Barelli* (1871) 25 LT 504; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, CA; *McGregor v McGregor* (1888) 21 QBD 424, CA; *Kingsford v Oxenden* (1891) 55 JP 789, CA; *Holsworthy UDC v Holsworthy RDC* [1907] 2 Ch 62. See also *Jayawickreme v Amarasuriya* [1918] AC 869, PC; *Horton v Horton (No 2)* [1961] 1 QB 215, [1960] 3 All ER 649, CA; *Tomlin v Standard Telephone and Cables Ltd* [1969] 3 All ER 201, [1969] 1 WLR 1378, CA; *Freedman (t/a John Freedman & Co) v Union Group plc* [1997] EGCS 28, CA; *Last-Harris v Thompson Bros Ltd* [1956] NZLR 995. See also para 1047 note 5 post.

9 *Lucy's Case* (1853) 4 De GM & G 356, CA.

10 *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, CA. As to mistake see para 703 et seq ante; and MISTAKE.

11 *Bracewell v Williams* (1866) LR 2 CP 196.

12 It may be that the invalidity of such compromises is based on public policy rather than want of consideration: see *Wade v Simeon* (1846) 2 CB 548 at 564 per Tyndal CJ; and para 858 post. Cf *Edwards v Baugh* (1843) 11 M & W 641 at 646.

13 Eg an agreement by a bookmaker not to sue his client for the amount of lost bets: *Hyams v Coombes* (1912) 28 TLR 413; *Burrell & Sons v Leven* (1926) 42 TLR 407; *Poteliakhoff v Teakle* [1938] 2 KB 816, [1938] 3 All ER 686, CA. *Goodson v Baker* (1908) 98 LT 415, was probably wrongly decided: see *Hyams v Stuart King* [1908] 2 KB 696 at 722, CA, per Fletcher Moulton LJ.

14 *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, CA.

15 *Re Blythe, ex p Banner* (1881) 17 ChD 480, CA. See also *Edwards v Baugh* (1843) 11 M & W 641.

16 As to illegal contracts see para 836 et seq post.

17 *Gaisburg v Storr* [1950] 1 KB 107, [1949] 2 All ER 411, CA. Certainly, the void promise will be unenforceable (see para 741 note 12 post); though the actual performance of a void promise may be good consideration (see para 741 note 14 post). For a possible statutory exception whereby the promise itself may be good consideration see the Matrimonial Causes Act 1973 s 34(1)(b); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 697.

There would appear to be clear parallels between the above rules and the doctrine of good faith dealings: see para 613 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(ii) What amounts to Consideration/741. Forbearance to sue.

### 741. Forbearance to sue.

Where a promisor makes an express or implied request to another to forbear from suing, it may be possible to imply a promise on the part of the promisee to forbear from suing<sup>1</sup>, in which case the matter falls within the principles previously discussed<sup>2</sup>; but even where no promise to forbear can be implied, the requested actual forbearance<sup>3</sup> may constitute valuable consideration<sup>4</sup>.

Where the consideration is alleged to consist of an actual forbearance<sup>5</sup>, such forbearance can only be valuable consideration where the promisee has reasonable grounds for believing, and does believe, that he has a good cause of action<sup>6</sup>, and the forbearance was causally connected with the promise<sup>7</sup>. Thus, there will be no consideration in the following cases: (1) where the promisee did not believe, or did not have reasonable grounds to believe, that he had any right which could be enforced either at law or in equity<sup>8</sup>; (2) where the forbearance was made without reference to the other party's promise<sup>9</sup>.

Where an agreement to forbear from suing<sup>10</sup> is void on grounds of public policy or statute<sup>11</sup>, that agreement will be unenforceable<sup>12</sup>. Nevertheless, the actual forbearance may, unless illegal<sup>13</sup>, be good consideration<sup>14</sup>.

1 Eg acceptance of a cheque in payment of an antecedent debt may be evidence of a promise to forbear to sue the debtor so long as the cheque is not dishonoured or at least for a reasonable time: *Baker v Walker* (1845) 14 M & W 465; *Elkington v Cooke-Hill* (1914) 30 TLR 670. As to the effect of the taking of a negotiable instrument in payment see paras 951-955 post. See also *Re Wyvern Developments Ltd* [1974] 2 All ER 535, [1974] 1 WLR 1097 (implied promise to forbear from applying to court to enforce a vendor's lien over land).

2 See para 740 ante.

3 In *Alliance Bank Ltd v Broom* (1864) 2 Drew & Sm 289 at 292, it was said to be sufficient that the defendant had received 'some degree of forbearance'. Presumably, it therefore follows that the forbearance may be either absolutely, or for a time certain, or for no specified time: cf para 740 notes 2-4 ante.

4 *Wells v Horton* (1826) 4 Bing 40; *Alliance Bank Ltd v Broom* (1864) 2 Drew & Sm 289; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 291, CA, obiter per Bowen LJ (contra at 285 per Cotton LJ); and see para 740 text to note 14 ante; *Fullerton v Provincial Bank of Ireland* [1903] AC 309 at 314, HL, per Lord Macnaghten. It may be a question of whether the forbearance to sue was the true consideration: *Bob Guinness Ltd v Salomonsen* [1948] 2 KB 42.

5 Whether to forbear from suing the promisor or a third party: *Therne v Fuller* (1616) Cro Jac 396; *Mapes v Sidney* (1624) Cro Jac 683; *Pullin v Stokes* (1794) 2 Hy Bl 312, Ex Ch; *Coe v Duffield* (1822) 7 Moore CP 252; *Smith v Algar* (1830) 1 B & Ad 603; *Willatts v Kennedy* (1831) 8 Bing 5; *Morton v Burn* (1837) 7 Ad & El 19; *Balfour v Sea Fire Life Assurance Co* (1857) 3 CBNS 300; *Oldershaw v King* (1857) 2 H & N 517, Ex Ch; *Coles v Pack* (1869) LR 5 CP 65; *Alhusen v Prest* (1851) 6 Exch 720; *Harris v Venables* (1872) LR 7 Exch 235; *Crears v Hunter* (1887) 19 QBD 341, CA.

6 *Willatts v Kennedy* (1831) 8 Bing 5; *Edwards v Baugh* (1843) 11 M & W 641; *Morton v Burn* (1837) 7 Ad & El 19 (forbearance for stated time); *Oldershaw v King* (1857) 2 H & N 517, Ex Ch (forbearance to press for immediate payment); *Crowhurst v Laverack* (1852) 8 Exch 208 (forbearance by mother of illegitimate children from affiliation proceedings (such proceedings have now been abolished)); *Wilby v Elgee* (1875) LR 10 CP 497 (forbearance to sue for doubtful claim sufficient); *Alliance Bank Ltd v Broom* (1864) 2 Drew & Sm 289; and *Fullerton v Provincial Bank of Ireland* [1903] AC 309, HL (forbearance by bank to enforce existing debt on promise to give security). See also *Bulsteel and Colmore v Parker and Bulsteel's Trustee* (1916) 32 TLR 661 (refraining from withdrawing balance of trust account from bank, on promise by bank to give security); *Re Wethered, ex p Salaman* [1926] Ch 167.

7 *Alliance Bank Ltd v Broom* (1864) 2 Drew & Sm 289. See also *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 289-291, CA, per Bowen LJ; *Crears v Hunter* (1887) 19 QBD 341, CA; *Glegg v Bromley* [1912] 3

KB 474, CA; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, [1942] 1 All ER 404; *Horton v Horton (No 2)* [1961] 1 QB 215, [1960] 3 All ER 649, CA. The parties may agree that it is irrelevant whether or not the promisee is the effective cause: *Freedman (t/a John Freedman & Co) v Union Group plc* [1997] EGCS 28, CA.

8 *Tooley v Windham* (1590) Cro Eliz 206; *Beven v Cowling* (1626) Poph 183; *Hunt v Swain* (1665) 1 Keb 890; *Loyd v Lee* (1718) 1 Stra 94; *Jones v Ashburnham* (1804) 4 East 455 (promise to pay debt of deceased); *Edwards v Baugh* (1843) 11 M & W 641 (mere dispute and controversy alleged); *Wade v Simeon* (1846) 2 CB 548 (proceedings where plaintiff knew there was no cause of action); *White v Bluett* (1853) 23 LJ Ex 36 (promise to cease complaining of testator's intended disposition of his property); *Billington v Osborne* (1895) 11 TLR 569 (seduction of promisee's servant, where no loss of service); *Chapman v Franklin* (1905) 21 TLR 515, DC; *Hyams v Coombes* (1912) 28 TLR 413 (both cases concerning time given in respect of a gaming debt; as to a promise to pay gaming debts see *Hill v William Hill (Park Lane) Ltd* [1949] AC 530, [1949] 2 All ER 452, HL; and cases there cited); *Re Pilet, ex p A Toursier & Co and Berkeley* [1915] 3 KB 519 at 526 (agreement to give time for discharged debt and agreement not to take bankruptcy proceedings when such proceedings must inevitably have ended in failure is not a valid consideration). In the case of a composition entered into between a debtor and his creditors, by which each of the creditors agrees to accept a smaller amount than is due in satisfaction of his claim, the consideration for each creditor's promise consists in the undertaking by the other creditors to forego part of their claims: see para 1048 post; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 884 et seq.

9 *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291; *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767, CA.

10 See para 740 ante.

11 Eg a maintenance agreement which purports to oust the jurisdiction of the court: see the Matrimonial Causes Act 1973 s 34; and see further para 857 post.

12 See eg *Hyman v Hyman* [1929] AC 601, HL; *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767, CA; *Bennett v Bennett* [1952] 1 KB 249, [1952] 1 All ER 413, CA; *Williams v Williams* [1957] 1 All ER 305, [1957] 1 WLR 148, CA. Cf *Re Staines UDC's Agreement, Triggs v Staines UDC* [1969] 1 Ch 10, [1968] 2 All ER 1.

13 As to illegal contracts see para 836 et seq post.

14 See eg *Rajbenback v Mamon* [1955] 1 QB 283, [1955] 1 All ER 12 (agreement not rendered void and unenforceable by the rent restriction legislation then in force); and cf *Shott v Shott* [1952] 1 All ER 735, CA. But see *Comber v Fleet Electrics Ltd* [1955] 2 All ER 161, [1955] 1 WLR 566. As to void agreements to forbear see further para 740 note 17 ante.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVITY/(1) CONSIDERATION/(ii) What amounts to Consideration/742. Marriage.

## **742. Marriage.**

Prior to 1 January 1971<sup>1</sup>, a promise to marry was held to be valuable consideration sufficient to support an ante-nuptial promise made by the parties to it<sup>2</sup>; but under the provisions of the Law Reform (Miscellaneous Provisions) Act 1970 an agreement between two persons to marry one another is not, under the law of England and Wales, to have effect as a contract giving rise to legal rights and no action lies in England and Wales for breach of such an agreement, whatever the law applicable to the agreement<sup>3</sup>. However, a promise to marry made to a third person is not affected by those provisions<sup>4</sup>.

1     I.e. the commencement date of the Law Reform (Miscellaneous Provisions) Act 1970: see s 7(3).

2     See para 612 note 9 ante. See further para 607 note 20 ante.

3     Law Reform (Miscellaneous Provisions) Act 1970 s 1(1); and see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 16. See also paras 723-724 ante.

4     I.e. if A promises B that A will marry C, that promise by A remains valuable consideration: see eg *Shadwell v Shadwell* (1860) 9 CBNS 159; *Luders v Anstey* (1799) 4 Ves 501 at 514. A postnuptial agreement or settlement is regarded as voluntary in the absence of consideration other than the marriage: *Butterfield v Heath* (1852) 15 Beav 408; *Shurmur v Sedgwick* (1883) 24 ChD 597. As to who are considered parties to the valuable consideration in the case of marriage settlements see para 760 post; and for a detailed treatment of the subject generally see SETTLEMENTS.

As to prenuptial agreements see further para 864 note 2 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVITY/(1) CONSIDERATION/(ii) What amounts to Consideration/743. Money held for another.

### **743. Money held for another.**

Where A has in his custody money belonging to B, and is instructed by B to hold it as the money of C, A becomes liable to C for the money as soon as he notifies C that the money is held on C's behalf. This principle is undoubtedly correct, though the courts have rationalised it on different grounds at different times. In the nineteenth century, it was explained in terms of agency<sup>1</sup>, or of consideration<sup>2</sup>, or of estoppel<sup>3</sup>; but it is today probably better regarded as a rule of the law of restitution<sup>4</sup>. This principle must be distinguished from the following<sup>5</sup>: (1) attornment by a bailee, which requires that the original bailor should have a right of property in the specific asset the subject of the attornment<sup>6</sup>; (2) assignment of a chose in action, which (whilst it may bind the debtor) does not bind the assignor until notice of the assignment has been given to the assignee<sup>7</sup>.

1 See eg *Lilly v Hays* (1836) 5 Ad & El 548 at 551 per Coleridge J. See further AGENCY vol 1 (2008) PARA 163.

2 *Hodgson v Anderson* (1825) 3 B & C 842; *Malcolm v Scott* (1850) 5 Exch 601 at 610 per Parke B; *Wharton v Walker* (1825) 4 B & C 163.

3 *Cobb v Becke* (1845) 6 QB 930 at 936 per Denman CJ; *Bower v Hett* [1895] 2 QB 337 at 339, CA, per Lord Esher MR. As to estoppel see generally para 702 ante; and ESTOPPEL.

4 See para 1072 et seq post.

5 The critical difference between attornment and assignment is as follows: the consent of the debtor is not necessary, though desirable, to perfect an equitable assignment (see CHOSSES IN ACTION vol 13 (2009) PARAS 3, 24 et seq), whereas in attornment it is essential to show that the debtor assented to hold to the use of the third party (*Laurie and Morewood v Dudin & Sons* [1926] 1 KB 223 at 237, CA, per Scrutton LJ).

6 See BAILMENT.

7 See CHOSSES IN ACTION vol 13 (2009) PARA 40 et seq.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(1) CONSIDERATION/(ii) What amounts to Consideration/744. Gratuitous bailments and promises.

#### **744. Gratuitous bailments and promises.**

In the case of a gratuitous bailment of goods, there can never be an executory contract of deposit because of the want of consideration<sup>1</sup>. As soon, however, as the bailee actually accepts the chattel he generally becomes responsible for it in some degree whilst it remains in his possession or under his control<sup>2</sup>. Actions in respect of bailment are clearly in a distinct category<sup>3</sup>.

A particularly striking example of the above-mentioned principle lies in mandate, a species of bailment under which the principal object of the bailment is the performance by the bailee of some gratuitous promise<sup>4</sup>. It is clear that, whilst his promise remains executory, the bailee incurs no liability for a refusal or failure to perform that promise<sup>5</sup>. On the other hand, if he actually performs his promise, the bailee is bound to exercise reasonable care and diligence<sup>6</sup>; at one time there was a tendency to find consideration and thus to explain this rule in terms of contract, but the rule would now appear to be firmly grounded in tort<sup>7</sup>.

A comparable principle applies to any promise to render gratuitous services<sup>8</sup> and to negligent misstatements; in the latter case, there used also to be a tendency on the part of the courts to strain to find consideration, so as to allow an action in contract in respect of careless words<sup>9</sup>. However, in modern times, such actions have been grounded in the tort of negligent misstatement<sup>10</sup>, on the basis that the promisor assumed responsibility<sup>11</sup> for his words<sup>12</sup>, but in the performance failed to take reasonable care<sup>13</sup>. Furthermore, in those cases where the promisor is under an already-existing contractual duty to a third party so to act, the tort principle has been extended to encompass liability in tort for omission<sup>14</sup>; but it seems unlikely that the tort liability will be extended to liability for pure economic loss<sup>15</sup>.

1 See para 727 ante.

2 *Coggs v Bernard* (1703) 2 Ld Raym 909; *Hart v Miles* (1858) 4 CBNS 371. See BAILMENT.

3 See BAILMENT vol 3(1) (2005 Reissue) para 1. The responsibility of the bailee has been explained in terms of contract, with consideration possibly presumed: see eg *Bainbridge v Firmston* (1838) 1 Per & Dav 2; *Hart v Miles* (1858) 4 CBNS 371. Presumption of consideration probably arose because actions in bailment were pleaded in assumpsit: see eg *Bainbridge v Firmston* (1838) 1 Per & Dav 2.

4 See BAILMENT vol 3(1) (2005 Reissue) paras 6, 20.

5 *Coggs v Bernard* (1703) 2 Ld Raym 909; *Elsee v Gatward* (1793) 5 Term Rep 143; *Balfe v West* (1853) 13 CB 466; and see *Skelton v London and North Western Ry Co* (1867) LR 2 CP 631 at 636 per Willes J; *Martin v Town N' Country Delicatessen Ltd* (1963) 45 WWR 413, 42 DLR 449, Man CA.

6 *Wilson v Brett* (1843) 1 M & W 113; *Beal v South Devon Ry Co* (1864) 3 H & C 337, Ex Ch; *Shiells v Blackburne* (1789) 1 Hy BI 158; *Whitehead v Greetham* (1825) 2 Bing 464, Ex Ch; *Giblin v McMullen* (1869) LR 2 PC 317; *Doorman v Jenkins* (1834) 2 Ad & El 256; *Williams v Curzon Syndicate Ltd* (1919) 35 TLR 475, CA.

7 See BAILMENT vol 3(1) (2005 Reissue) para 22; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; para 608 ante; and NEGLIGENCE vol 78 (2010) PARA 14.

8 *Moffatt v Bateman* (1869) LR 3 PC 115; *Wilkinson v Coverdale* (1793) 1 Esp 74; *Dartnall v Howard* (1825) 4 B & C 345; *Donaldson v Haldane* (1840) 7 Cl & Fin 762, HL.

9 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; para 611 ante; and NEGLIGENCE vol 78 (2010) PARA 14. See also para 759 post.

10 Eg in *De La Bere v Pearson Ltd* [1908] 1 KB 280, CA (newspaper column giving careless investment advice). Cf, however, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 528, [1963] 2 All ER 575 at 610, HL, per Lord Devlin ('today the result can and should be achieved by the application of the law of negligence'). As to the adequacy of the consideration see para 736 ante.

11 This would seem to satisfy automatically (impliedly) any requirement of reliance by the promisee: see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 182, [1994] 3 All ER 506 at 521-522, HL, per Lord Goff.

12 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL.

13 *Barclays Bank plc v Fairclough Building Ltd* [1995] IRLR 605, CA.

14 *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, [1978] 3 All ER 571; *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL; and see para 610 ante.

15 Because, if the tort liability were granted on the basis of assumption of liability for economic loss, that would be tantamount to a nudum pactum agreeing to be liable for economic loss. As to nudum pactum see para 727 ante. As to claims in tort for economic loss see para 759 post.

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#### **745. Compliance with obligations imposed by law.**

One possible view is that a person who performs, or agrees to perform, a duty he is already bound in law<sup>1</sup> to do provides no consideration<sup>2</sup>. However, even if this be so, it is clear that performance of, or agreement to perform, an act over and above that legal duty is good consideration<sup>3</sup>.

Early authority to the effect that a person cannot recover money in return for performance of, or a promise to perform, a duty imposed by law was based on public policy<sup>4</sup>; but in a nineteenth century action by a person for loss of time during his attendance on a subpoena the rule was said to be grounded upon an absence of consideration<sup>5</sup>. On the other hand, in the cases concerned with rewards for information of crimes, where there was no objection on the grounds of public policy<sup>6</sup>, the performance of a duty imposed by law<sup>7</sup> was consistently accepted as sufficient consideration<sup>8</sup>; and it has for some time been the established practice to remunerate witnesses<sup>9</sup>. All this has led to the modern suggestion that performance of a legal duty may be valuable consideration so long as to regard it in this light is not against public policy<sup>10</sup>.

1 As to the position with regard to duties imposed by contract see paras 746-747 post.

2 See eg *Bridge v Cage* (1605) Cro Jac 103; *Darley's Case* (1631) Het 175 (promise to pay sheriff in consideration of his performing his legal duties); *King v Hobbs* (1603) Yelv 26; *Randal and Harvey's Case* (1623) Godb 358; *Atkinson v Settree* (1744) Willes 482; *Herring v Dorell* (1840) 8 Dowl 604 (promise to pay for discharge from illegal arrest); *Strong v Courtney* (1705) 6 Mod Rep 265 (agreement for quiet enjoyment of lands, without molestation from annuitant whose annuity is charged thereon); *Collins v Godefroy* (1831) 1 B & Ad 950 (attendance of witness on subpoena); *Crowhurst v Laverack* (1852) 8 Exch 208 (agreement by mother to support her illegitimate children); *Southwark Corp v Partington Advertising Co* (1905) 69 JP 183 (agreement to pay for permission of borough council to exhibit advertisements, the council being under legal obligation to use its authority in the matter); *Sanderson v Workington Borough Council* (1918) 34 TLR 386 (war service by territorial soldier already mobilised); *Pao On v Lau Yiu Long* [1980] AC 614 at 633, [1979] 3 All ER 65 at 77, PC.

3 *Smith v Roche* (1859) 6 CBNS 223 (provision in addition to legal obligation to support illegitimate child); *Jennings v Brown* (1842) 9 M & W 496; *Knowlman v Bluett* (1874) LR 9 Exch 307, Ex Ch (agreement by father to support illegitimate child); *Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270, HL (the police had a statutory duty to protect the public, but a discretion as to how they performed that duty, and thus promising to provide more protection than in their discretion they thought necessary was consideration); and see the Police Act 1996 s 25. See also *Harris v Sheffield United Football Club Ltd* [1988] QB 77, [1987] 2 All ER 838, CA; and POLICE vol 36(1) (2007 Reissue) para 193. Cf *China Navigation Co Ltd v A-G* [1932] 2 KB 197, CA.

This may be the explanation of the following cases: *Ward v Byham* [1956] 2 All ER 318, [1956] 1 WLR 496, CA; *Williams v Williams* [1957] 1 All ER 305, [1957] 1 WLR 148, CA; but see also para 735 note 9 ante; and see note 10 infra.

4 *Wathen v Sandys* (1811) 2 Camp 640; *Morris v Burdett* (1808) 1 Camp 218; *Bilke v Havelock* (1813) 3 Camp 374. Cf *Morgan v Palmer* (1824) 2 B & C 729 at 736. As to agreements void on grounds of public policy see generally para 841 et seq post.

5 *Collins v Godefroy* (1831) 1 B & Ad 950. Cf *Willis v Peckham* (1820) 1 Brod & Bing 515.

6 Contrast *Maryland Casualty Co v Matthews* 209 F Supp 822 (USA 1962) (claim by a detective failed on grounds of public policy).

7 It was a misprision of felony not to communicate information of a felony to the police: *Sykes v DPP* [1962] AC 528, [1961] 3 All ER 33, HL; but see now the Criminal Law Act 1967 s 5(1) (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 734.

8 Even performance by police officers: *England v Davidson* (1840) 11 Ad & El 856; *Neville v Kelly* (1862) 12 CBNS 740; *Bent v Wakefield and Barnsley Union Bank* (1878) 4 CPD 1. See also the cases cited in para 639 note 9 ante.

9 *Re Working Men's Mutual Society* (1882) 21 ChD 831; *Chamberlain v Stoneham* (1889) 24 QBD 113, DC (expert witnesses); and as to ordinary witnesses see the Supreme Court Act 1981 s 36(4) (amended by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 13); and see generally CIVIL PROCEDURE vol 11 (2009) PARA 1013 et seq.

10 *Ward v Byham* [1956] 2 All ER 318, [1956] 1 WLR 496, CA (father of an illegitimate child promised to pay the child's mother £1 per week, 'provided you can prove that [the child] is well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you'); *Williams v Williams* [1957] 1 All ER 305, [1957] 1 WLR 148, CA (wife in desertion promised, in return for a weekly sum from husband, to support herself). In both these cases, only Denning LJ purported to base his decision on the grounds that performance of an existing legal duty (of a mother to support her illegitimate child, and of a deserting wife to support herself) was good consideration for the promise to pay money; and both the other members of the court found an act over and above that legal duty: see note 3 supra. See also *Papiw v Papiw* [1959] VR 197.

To the contrary is the United States position: see the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 73; Williston *Law of Contract* (3rd Edn) (1957) para 132.

## UPDATE

### 745 Compliance with obligations imposed by law

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--Police Act 1996 s 25 amended: Greater London Authority Act 1999 s 325, Sch 27 para 80; SI 2004/1573.

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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#### **746. Compliance with obligations imposed by contract with third party.**

Can a promise to perform, or performance of, a contractual duty<sup>1</sup> already owed to one person be good consideration for a promise given by another: if there is a contract between A and B under which an act is still to be performed by B, can the promise to perform, or performance of, that act by B be good consideration for a promise made to B by C? Whatever may be the position with regard to such an act or promise by B to A<sup>2</sup>, the present paragraph is concerned with the provision of consideration by B with which to support a promise by C. The early authorities were inconclusive<sup>3</sup>; and the later cases may make it necessary to distinguish between the promise made by B to perform the act and its actual performance<sup>4</sup>.

Where, in return for a promise by C, B actually performs a contractual duty owed to A, the nineteenth century authorities seem similarly ambiguous<sup>5</sup>: in two of them it is possible to presume additional consideration given by B to C<sup>6</sup>; and the third is doubtful<sup>7</sup>. On the other hand, modern opinion seems to favour the view that performance of an existing duty owed to a third party should be good consideration<sup>8</sup>.

Where, in return for a promise by C, B merely promises C that he will perform a contractual duty owed to A, there is some early authority to suggest that B has given no consideration to C<sup>9</sup>. However, the predominant modern opinion would appear to be that there is no good reason for distinguishing between performance and a promise to perform by B<sup>10</sup>.

1 As to the position with regard to duties imposed by law see para 745 ante.

2 See para 747 post.

3 *Bret v JS* (1600) Cro Eliz 756; *Sherwood v Woodward* (1600) Cro Eliz 700; *Bagge v Slade* (1616) 3 Bulst 162; *Westbie v Cockaine* (1631) 1 Vin Abr 312 pl 36; *Moore v Bray* (1633) 1 Vin Abr 310 pl 31. See also *Morton v Burn* (1837) 7 Ad & El 19; *King v Sears* (1835) 2 Cr M & R 48.

4 The difficulty arises because, whilst in the case of performance there is no legal detriment or benefit, there may be a factual detriment or benefit: for this distinction see generally paras 735, 738 note 13 ante. However, it has even been argued that the promise by B to C should be good consideration because the promise involves B in two possible actions for breach of contract, whereas performance by B should not since it discharges the promise to A and therefore is no detriment to B: Pollock *Principles of Contract* (13th Edn) (1950) pp 147-150; 8 Holdsworth's *History of English Law* (2nd Edn) (1937) 40-41. However, this is to ignore the element of benefit to C, which is present both in the actual performance and the promise to perform.

5 *Shadwell v Shadwell* (1860) 9 CBNS 159; *Scotson v Pegg* (1861) 6 H & N 295; *Chichester v Cobb* (1866) 14 LT 433.

6 *Scotson v Pegg* (1861) 6 H & N 295 at 299 (B may have had a lien over the coal, and agreed to release it in return for C's promise); *Chichester v Cobb* (1866) 14 LT 433 (the consideration for C's promise may have been the making of 'pecuniary and other arrangements' by B for her marriage).

7 *Shadwell v Shadwell* (1860) 9 CBNS 159. On the true construction of C's letter, B's marriage to EN may have been merely a condition rather than consideration. This was the view of Byles J dissenting, who thought that there was no contractual intention; and it is supported by Salmon LJ in *Jones v Padavatton* [1969] 2 All ER 616 at 621, [1969] 1 WLR 328 at 333, CA.

8 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC (unilateral contract between B and C (see para 657 note 13 ante); and see the first instance decision sub nom *The Eurymedon* [1971] 2 Lloyd's Rep 399 at 409, NZ, per Beattie J). The Privy Council decision in *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* supra was followed in *Port Jackson Stevedoring Pty Ltd v Salmond*

and *Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257, [1981] 1 WLR 138, PC; *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd, The Antwerpen* [1994] 1 Lloyd's Rep 213, NSW.

See also AG Davies 'Promises to Perform an Existing Duty' [1937] CLJ 203; and the following United States works: the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 73; Corbin *Contract* (1963) paras 177-178; *dubitante*; Williston *Law of Contract* (3rd Edn) (1957) para 131.

9 *Jones v Waite* (1839) 5 Bing NC 341 (C promised to pay B money if B would (1) execute a separation agreement; (2) pay some of B's own debts, for which B did not admit sole liability. Held that there was a binding contract on ground (1) (affd (1842) 9 Cl & Fin 101, HL) and at first instance, it was said (at 351) that ground (2) was 'wholly nugatory, as being merely an engagement by a man to pay his own debts'. Contrast *Morton v Burn* (1837) 7 Ad & El 19 (promise to pay an assignee). As to assignments see paras 757-758 post; and as to joint obligations see para 1079 et seq post.

The view in *Jones v Waite* supra seems to be supported by Lord Reid in *Pfizer Corp v Ministry of Health* [1965] AC 512 at 536, [1965] 1 All ER 450 at 455, HL (but it may be that his Lordship was only considering whether the relationship was a contractual one generally, rather than the specific problem of consideration here discussed).

10 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 168, [1974] 1 All ER 1015 at 1021, PC, obiter per Lord Wilberforce reading the majority judgment; *Pao On v Lau Yiu Long* [1980] AC 614, [1979] 3 All ER 65, PC (A was a company in which C had an interest, so that C stood to gain if B performed his contract with A. This was held sufficient consideration to support C's guarantee to B. For other points decided see paras 711 (economic duress), 739 (executed consideration) ante. See also Corbin, *Contract* (1963) para 178; Chitty on Contracts (27th Edn) para 3-057; AG Davies 'Promises to Perform an Existing Duty' [1937] CLJ 203 at 216. But see Williston *Law of Contract* (3rd Edn) (1957) para 131.



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#### **747. Compliance with obligations imposed by contract with promisor.**

It would appear to have been settled at one time that a promise by B to perform, or performance by B of, a contractual duty<sup>1</sup> owed by B to A could not be consideration for a further promise given to B by A<sup>2</sup>. In the early cases, it was said that it could not amount to consideration for reasons of public policy, namely to protect A from extortion by B<sup>3</sup>. Later, the rule was put on grounds of want of consideration<sup>4</sup>: for instance, a warranty given after a contract for the sale of goods had been made, being merely past consideration<sup>5</sup>; payment of a lesser sum was no satisfaction of a greater<sup>6</sup>, even sometimes when paid at a different place<sup>7</sup>; an employee's performance of his duty of service<sup>8</sup>, or to disclose breaches of contract by fellow-employees<sup>9</sup>; a promise to pay extra freight for the carriage of goods to an agreed destination<sup>10</sup>.

These above-mentioned cases seem to have in common that, whilst there might have been a factual benefit conferred on A, consideration required a legal benefit<sup>11</sup>. Yet, it has been held<sup>12</sup> that a carpentry sub-contractor (B) who had already contracted with the main contractor (A) to refurbish a number of flats for a price of £20,000 could sue on A's subsequent promise to pay B an extra £10,300 if he completed the refurbishment<sup>13</sup>, seemingly<sup>14</sup> because that completion was a factual benefit to A<sup>15</sup>. This certainly accords with the modern rule that A's performance would be sufficient consideration to support a promise by C<sup>16</sup>; but it is difficult to reconcile with the following rules: (1) an employee's performance of his duty of service is no consideration<sup>17</sup>; and (2) payment of a lesser sum is no satisfaction of a greater<sup>18</sup>.

However, even if the promise or performance of an existing duty is no consideration, that rule is subject to the following qualifications: where the original contract itself provides for the revision of payments up or down<sup>19</sup>; where B exceeds his duty under the original contract<sup>20</sup>; where the original contract has been determined before the subsequent promise, as by frustration, consent or lapse of time<sup>21</sup>; where the original contract was void, voidable or unenforceable<sup>22</sup>; where the original contract was wrongly but genuinely believed by B not to impose on him the obligation subsequently agreed, or to be defective<sup>23</sup>; or where he increases a performance guarantee<sup>24</sup>. Moreover, perhaps A is bound where the parties agree to determine the old contract and substitute a new one<sup>25</sup>; or where A agrees to waive the original contract<sup>26</sup>, or to accept something less than complete performance of it<sup>27</sup>.

1 As to the position with regard to duties imposed by law see para 745 ante.

2 See eg *Dixon v Adams* (1597) Cro Eliz 538 (payment of principal's debt by bail); *Bayley v Homan* (1837) 3 Bing NC 915 (promise by lessee to repair by certain day no consideration for promise by lessor to forbear from suing for breach of covenant to repair); *Lewis v Edwards* (1840) 7 M & W 300 (promise by solvent partner to pay debts of insolvent partnership); *Cowper v Green* (1841) 7 M & W 633 (relinquishment of security for debt after release of the debt); *Jackson v Cobbin* (1841) 8 M & W 790 (promise to perform promisor's part of existing agreement); *Mallalieu v Hodgson* (1851) 16 QB 689 (bills taken up by party already liable thereon); *Luxmore v Clifton* (1867) 17 LT 460 (execution of security by party already under obligation to do so); *Swain v West (Butchers) Ltd* [1936] 3 All ER 261, CA (employee already bound to answer employer's questions concerning fraud); *Gilbert Steel Ltd v University Construction Ltd* (1976) 12 OR (2d) 19, Ont.

3 *Harris v Watson* (1791) Peake 102. In modern times, such an argument could be based on economic duress: see para 711 ante.

4 In the following case, the court used both the arguments of public policy and want of consideration: *Stilk v Myrick* (1809) as reported in 2 Camp 317 (consideration) and 6 Esp 129 (public policy): it has been said that the former report has a better reputation (*North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic*

*Baron* [1979] QB 705 at 712, [1978] 3 All ER 1170 at 1177 per Mocatta J). Subsequently, the matter was put wholly upon want of consideration: *Harris v Carter* (1854) 3 E & B 559; *Sanderson v Workington Borough Council* (1918) 34 TLR 386. But the United States view would appear to be that at common law such agreements are unenforceable for want of consideration: American Law Institute's *Restatement of the Law of Contracts* (2d) (1981) s 73; Corbin *Contract* (1963) para 175; Williston *Law of Contract* (3rd Edn) (1957) paras 130-130B.

5 *Roscorla v Thomas* (1842) 3 QB 234. As to past consideration see generally para 739 ante.

6 *Pinnel's Case* (1602) 5 Co Rep 117a; *Foakes v Beer* (1884) 9 App Cas 605, HL.

7 *Vanbergen v St Edmunds Properties Ltd* [1933] 2 KB 223, CA (debtor (A) requested creditor (B) to allow A to pay at a different place). It is otherwise if A paid at a different place at B's request: see para 1045 note 17 post.

8 *Harris v Watson* (1791) Peake 102; *Harris v Carter* (1854) 3 E & B 559; *Frazer v Hatton* (1857) 2 CBNS 512; *Harrison v Dodd* (1914) 111 LT 47, DC. It is otherwise if the seamen are justified in refusing to proceed on the voyage: see the cases cited in note 20 infra.

9 *Swain v West (Butchers) Ltd* [1936] 3 All ER 261, CA. There is a clear public policy element here in that the servant participated in the fraud on his employer.

10 *Syros Shipping Co SA v Elaghill Trading Co, The Proodos C* [1981] 3 All ER 189, [1980] 2 Lloyd's Rep 390; *Atlas Express Co Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641.

11 As to legal as opposed to factual benefit see paras 735, 738 note 13 ante.

12 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA. See also *Anangel Atlas Compania Naviera SA v Ishikawajima Harima Heavy Industries Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526 (held: clear benefit or avoidance of detriment if A agreed to take delivery of a ship on time, in that it would 'encourage other reluctant customers to follow suit'); *Robichaud v Caisse Populaire de Pokemouche Ltée* (1990) 69 DLR (4th) 589 (immediate receipt of payment and the giving of time, effort and expense are sufficient consideration to make an agreement for part payment enforceable).

13 The judge found an implied term that the £20,000 was payable by reasonable instalments as the work proceeded; and that the extra £10,300 was payable at the rate of £575 for each flat as the carpentry work on it was completed: see *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 6, [1990] 1 All ER 512 at 514, CA, summarising conclusions reached in the county court (31 January 1989).

14 From the findings in note 13 supra, it might be that B promised for the first time to complete the carpentry work on each flat one flat at a time: see para 736 note 13 ante. If so, that might amount to the extra legal benefit necessary to bring the case within the extra consideration cases referred to in notes 20-24 infra.

15 If B did not complete his sub-contract with A, A might suffer penalties for late performance under the main building contract with a third party; whereas if B did complete one flat at a time, this would be beneficial to A as enabling him to direct other trades into such flats. This was described as a 'practical benefit': *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 11, [1990] 1 All ER 512 at 518, CA, per Glidewell LJ. As to factual benefit see note 11 supra. The case also seems explicable on the basis of good faith dealings: see para 613 ante.

16 See para 746 ante.

17 See note 8 supra. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA, *Stilk v Myrick* (1809) 2 Camp 317 was deliberately approved: see *Williams v Roffey Bros & Nicholls (Contractors) Ltd* supra at 15-16 and at 521-522 per Glidewell LJ, at 19 and 524 per Russell LJ and at 20 and 525 per Purchas LJ.

18 *Re Selectmove Ltd* [1995] 2 All ER 531, [1995] 1 WLR 474, CA (distinguishing *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA: as (1) inconsistent with *Foakes v Beer* (1884) 9 App Cas 605, HL (see note 6 supra); and (2) confined to supplies of goods and services (see note 17 supra).

19 Eg a clause providing that the price should vary with the cost of labour and materials. Cf *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918, CA (loan contract with variable interest rate).

20 *Hartley v Ponsonby* (1857) 7 E & B 872; *Turner v Owen* (1862) 3 F & F 176; *Hanson v Royden* (1867) LR 3 CP 47; *O'Neill v Armstrong, Mitchell & Co* [1895] 2 QB 418, CA; *Palace Shipping Co Ltd v Caine* [1907] AC 386, HL; *Liston v SS Carpathian (Owners)* [1915] 2 KB 42; *North Ocean Shipping Co Ltd v Hyundai Construction Co*

*Ltd, The Atlantic Baron* [1979] QB 705 at 712, [1978] 3 All ER 1170 at 1173. Cf *Harris v Carter* (1854) 3 E & B 559, and the other cases cited in note 7 supra.

21 As to discharge of a contract in such ways see paras 897 et seq, 1014 et seq, 979 et seq respectively post.

22 As to the distinction between void, voidable and unenforceable contracts see para 607 ante.

23 *Williams v O'Keefe* [1910] AC 186, PC. This would amount to a compromise, as to which see generally para 740 ante.

24 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705 at 712, [1978] 3 All ER 1170 at 1173.

25 See para 1042 note 13 post. Cf *Harris v Carter* (1854) 3 E & B 559; *Fox v Pianoforte Supplies* (1963) 114 L Jo 140. The objection to allowing such an exception is that, in practice, it would be difficult to distinguish from a simple promise to perform the existing contractual duty.

26 See paras 1025-1028 post.

27 See para 1030 post.

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## **(2) PRIVACY**

### **(i) The Doctrine of Privity**

#### **748. The general rule.**

The doctrine of privity of contract is that, as a general rule<sup>1</sup>, at common law a contract cannot confer rights<sup>2</sup> or impose obligations<sup>3</sup> on strangers to it, that is, persons who are not parties to it<sup>4</sup>. The parties to a contract are those persons who reach agreement<sup>5</sup> and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts<sup>6</sup>; collateral contracts<sup>7</sup>; irrevocable credits<sup>8</sup>; contracts made on the basis of the memorandum and articles of a company<sup>9</sup>; collective agreements<sup>10</sup>; contracts with unincorporated associations<sup>11</sup>; and mortgage surveys and valuations<sup>12</sup>.

Despite some earlier doubts<sup>13</sup>, in the mid-nineteenth century the doctrine of privity was accepted by the courts<sup>14</sup>, though those doubts seem to have been resurrected in more recent times<sup>15</sup>, albeit by a minority of cases<sup>16</sup>. The privity of contract rule used to be regarded as intimately connected with the doctrine of consideration<sup>17</sup> and the rule that consideration must move from the promisee<sup>18</sup>.

1 As to the exceptions see para 754 et seq post.

2 See para 749 post.

3 See para 750 post.

4 It does not follow that a contract between A and B cannot indirectly affect the legal rights of a third party (C). For instance, B may make part payment of a debt owed by C (*Hirachand Punamchand v Temple*[1911] 2 KB 330, CA); and a contract between A and B may affect C in tort (see para 611 ante).

5 As to the process of reaching agreement see para 631 et seq ante.

6 See para 751 post.

7 See para 753 post.

8 See para 754 post.

9 See para 763 post.

10 See para 752 post.

11 See paras 765-766 post.

12 Where the valuer/surveyor (C) is an employee of the mortgagee (A), there may be a valuation/survey contract between A and the mortgagor (B) under which A is prima facie liable to B for defects in the valuation/survey (*Halifax Building Society v Adel*[1992] Ch 436, [1992] 3 All ER 389) and vicariously liable for any negligent misstatement by C (*Smith v Eric S Bush, Harris v Wyre Forest District Council*[1990] 1 AC 831, [1989] 2 All ER 514, HL; and see para 759 post). Where C is an independent contractor, C may be liable to B for a defective survey/valuation under a collateral contract (see para 753 post) or in the tort of negligent misstatement (see para 759 note 9 post). As to the effect of an exclusion clause in such a valuation/survey see para 822 post.

13 See *Dutton v Poole* (1677) 2 Lev 210; affd T Raym 302 (it was assumed that natural love and affection was good consideration: as to which see para 737 ante). Cf *Thomas v --* (1655) Sty 461; *Martyn v Hind* (1776) 2 Cowp 437, 443; *Marchington v Vernon* (1787) 1 Bos & P 101 note (c). But see *Bourne v Mason* (1668) 1 Vent 6.

14 *Schmaling v Tomlinson* (1815) 6 Taunt 147; *Price v Easton* (1833) 4 B & Ad 433; *Tweddle v Atkinson* (1861) 1 B & S 393; *Playford v United Kingdom Telegraph Co* (1869) LR 4 QB 706; *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1, CA; *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 152, CA; *Fleming v Bank of New Zealand* [1900] AC 577, PC; *Keighley, Maxsted & Co Durant* [1901] AC 240, HL; *Cavalier v Pope* [1906] AC 428, HL; *Cameron v Young* [1908] AC 176, HL; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL; *Rederiaktiebolaget Argonaut v Han* [1918] 2 KB 247 (with which cf *Fred Drughorn Ltd v Rederiaktiebolaget Trans-Atlantic* [1919] AC 203, HL (contracts by agent as 'charterer')); *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL; *Bart v British Indian Airways Ltd* [1967] 1 Lloyd's Rep 239, Guyana CA; *Kepong Prospecting v Schmidt* [1968] AC 810, PC. Cf *Yzquierdo v Clydebank Engineering and Shipbuilding Co* [1902] AC 524, HL; *Davis & Sons v Taff Vale Rly Co* [1895] AC 542, HL.

15 See *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 514, [1949] 2 All ER 179 at 188, CA, per Denning LJ; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 at 275, [1953] 2 All ER 1475 at 1483, CA, per Denning LJ; *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 421-423, [1954] 2 All ER 158 at 165-167 per Devlin J; *Rayfield v Hands* [1960] Ch 1 at 6-7, [1958] 2 All ER 194 at 198 per Vaisey J; the dissenting judgment of Lord Denning in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Beswick v Beswick* [1966] Ch 538 at 555, 557, [1966] 3 All ER 1 at 7, 9, CA, per Lord Denning MR; affd on other grounds [1968] AC 58, [1967] 2 All ER 1197, HL (see note 16 infra; and para 749 note 4 post). See also para 760 note 7 post.

In the twentieth century, various proposals have been put forward to reduce the effect and scope of the doctrine of privity: see the *Sixth Interim Report of the Law Revision Committee* (1937, Cmnd 5449), Section D; *Privity of Contract: Contracts for the benefit of Third Parties* (1996) (Law Com no 242); and see para 763 note 17 post.

16 In *Gandy v Gandy* (1885) 30 ChD 57 at 69, CA, Bowen LJ, when dealing with the matter of privity in that case, said that it would be mere pedantry to resurrect the old cases. The continued existence of the privity doctrine was reaffirmed by the majority of the House of Lords in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Beswick v Beswick* [1966] AC 58, [1967] 2 All ER 1197, HL. It has since been assumed in the following cases: *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; *New Zealand Shipping Co Ltd v AM Satterthwaite Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257, [1981] 1 WLR 138, PC; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277, HL.

17 See para 727 et seq ante.

18 *Price v Easton* (1833) 4 B & Ad 433. Whilst the two rules are obviously very closely connected, it has been suggested that they are in fact separate rules: *Kepong Prospecting Ltd v Schmidt* [1968] AC 810 at 826, PC. As to the rule that consideration must move from the promisee see para 734 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(i) The Doctrine of Privity/749. Attempts to confer benefits on strangers.

#### **749. Attempts to confer benefits on strangers.**

The general common law rule is that nobody except a party to a contract can acquire rights under it; therefore A and B cannot contract that B shall confer a benefit on C in such a way that C may enforce that benefit in contract<sup>1</sup>. Thus, unless perhaps A and C were joint promisees<sup>2</sup>, C could not in his own right<sup>3</sup> bring an action in contract to enforce any of the following promises made by B to A: to pay a sum of money to C<sup>4</sup>; not to sell C's goods below a stipulated price<sup>5</sup>; that C should have the benefit of a clause purporting to exempt C from liability in tort<sup>6</sup>; and that a landlord (C) could not use a lapsed covenant to insure to take advantage of an agreement between his lessee (A) and insurer (B)<sup>7</sup>. On the other hand, the agreement between A and B might affect the rights of C indirectly: for instance a promise by B that C shall have the benefit of an exclusion clause if he performs part of A's contractual duty to B, may amount to an offer by B which C may accept by performance<sup>8</sup>; or it may be that much the same effect can be achieved by way of a circular indemnity<sup>9</sup>; and agreement by B to accept from A part-payment of C's debt to B in full settlement may preclude B from suing C for the balance<sup>10</sup>.

Whilst C may not sue B for breach of contract, A may seek redress from B by way of any of the following remedies: first, he might sometimes reclaim his consideration on grounds of total failure of consideration<sup>11</sup>; secondly, if B's promise were to pay a sum of money to C, A might sue for payment of that sum to himself<sup>12</sup>; thirdly, A might claim damages and, though these would generally only be nominal<sup>13</sup>, there are circumstances where A might recover substantial damages<sup>14</sup>. Alternatively, A may obtain a decree of specific performance of the contract, requiring B to confer the promised benefit (including the payment of money) on C<sup>15</sup>; or a declaration that he should do so<sup>16</sup>, together with a stay of proceedings against C where appropriate<sup>17</sup>.

Three further problems arise:

- 64 (1) where B performs, or promises to perform, his promise, can C retain the benefit of that promise for himself? This is a matter of the true construction of the contract: if the promise was made with the intention of benefiting C, B is entitled to perform such promise and C may retain any benefit thereby conferred<sup>18</sup>, though it would seem that, whilst the promise remains executory, A and B may vary the contract so as to deprive C of the benefit<sup>19</sup>; but, if the promise was made with the intention of benefiting A, A is entitled to that benefit<sup>20</sup>;
- 65 (2) what is the position where A refuses to enforce the promise for the benefit of C? It has been suggested that C could circumvent the doctrine of privity by suing B and joining A as co-defendant<sup>21</sup>, but such a view would be fundamentally inconsistent with that doctrine<sup>22</sup>, and with the cases in which the courts have found that a trust of the promise has, or has not, been created<sup>23</sup>;
- 66 (3) where A succeeds in recovering the consideration or damages from B<sup>24</sup>, can he retain any such benefit recovered for himself? If the contract were made to discharge some obligation of A to C, it would seem that the court could direct A to apply the money for the benefit of C<sup>25</sup>; but if, as between A and C the payment is gratuitous, then, in the absence of a trust<sup>26</sup>, the position is more doubtful<sup>27</sup>.

1 Several possible reasons have been assigned for this rule: (1) it would be unjust to allow C to sue on the contract when he could not be sued on it (*Tweddle v Atkinson* (1861) 1 B & S 393 at 398); (2) to allow C to sue would unduly hamper the rights of A and B to vary the contract (as to variation of contracts see para 1019 et seq post); (3) C is frequently a mere donee, and even a donee-promisee cannot enforce a gratuitous promise

(see para 727 note 4 ante). For the general rule see para 748 ante; and for the exceptions thereto see para 754 et seq post.

2 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 180, [1974] 1 All ER 1015 at 1030, PC, obiter per Lord Simon, citing *McEvoy v Belfast Banking Co Ltd* [1935] AC 24 at 36, 43, 52, HL; *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] ALR 385, at 395, 400, 405, Aust HC; and see further para 734 note 2 ante. As to joint promises see para 1079 et seq post.

3 But he might be able to do so as legal representative of A: *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

4 *Tweddle v Atkinson* (1861) 1 B & S 393; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL (a claim by C was at issue in the Court of Appeal, but not in the House of Lords, though their Lordships accepted the correctness of the view stated in the text; see at 72 and at 1201 per Lord Reid, at 81 and 1207 per Lord Hodson, at 83 and 1208-1209 per Lord Guest, at 92-93 and 1215 per Lord Pearce and at 95 and 1217 per Lord Upjohn).

5 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL (but see now the Resale Prices Act 1976). See also COMPETITION.

6 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL (case concerning the terms of a bill of lading but also decided on the grounds that, as a matter of construction, the relevant clause did not purport to limit the liability of C); *Southern Water Authority v Carey* [1985] 2 All ER 1077; and see further para 813 post.

7 *Naumann v Ford* [1985] 2 EGLR 70.

8 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC (offer of a consignor of goods by way of bill of lading of immunity to any independent contractor who helps in the transportation process); *Southern Water Authority v Carey* [1985] 2 All ER 1077; *Rabaul Stevedores Ltd v Seeto* [1985] LRC (Comm) 383 (Papua New Guinea); *Marubeni America Corp v Mitsui Osk Lines Ltd* (1979) 96 DLR (3d) 518, Can Fed Ct. See further para 815 post; and CARRIAGE AND CARRIERS.

9 See *Scruttons Ltd v Midlands Silicones Ltd* [1962] AC 446 at 473, [1962] 1 All ER 1 at 10, HL, obiter per Lord Reid ('If A, wishing to protect C, gives C an enforceable indemnity, and contracts with B that B will not sue C, informing B of the indemnity, and then B does sue C in breach of his contract with A, it may be that A can recover from B as damages the sum which he has to pay to C under the indemnity, C having had to pay it to B'); *London Drugs Ltd v Kuehne & Nagel International Ltd* [1993] 4 LRC 415, Can SC; and see further para 816 post.

10 *Hirachand Punamchand v Temple* [1911] 2 KB 330, CA; see further para 1045 post.

11 As to this remedy see RESTITUTION vol 40(1) (2007 Reissue) para 87 et seq.

12 *Lloyd's v Harper* (1880) 16 ChD 290 at 321, CA, per Lush LJ. However, this dictum has been disapproved in *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 501, Aust HC, obiter per Windeyer J; *Beswick v Beswick* [1968] AC 58 at 88, [1967] 2 All ER 1197 at 1212, HL, per Lord Pearce; but it was approved by Lord Denning MR in *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92 at 95-96, [1975] 1 WLR 1468 at 1473, CA, where he held that a father contracting for himself and his family could recover damages for the discomfort and upset suffered by the whole family. For exceptional cases where such a claim by A has succeeded see *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA; *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348.

13 *Beswick v Beswick* [1966] Ch 538 at 565, [1966] 3 All ER 1 at 14, CA, per Salmon LJ; affd [1968] AC 58 at 73, [1967] 2 All ER 1197 at 1202, HL, per Lord Reid, at 78 and at 1205 per Lord Hodson, at 83 and 1208 per Lord Guest, and at 99 and 1219-1220 per Lord Upjohn. Only Lord Pearce thought that damages would be substantial (at 88 and 1212). See also *Rodwell v Harper* (1954) 105 L Jo 268, county court. In *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277, HL, it was held obiter, whilst supporting the view that any damages should be nominal, that the present state of the law on this point is unsatisfactory (see para 760 note 7 post); see also *Albacruz v Albazero, The Albazero* [1977] AC 774 at 846, [1976] 3 All ER 129 at 136, HL; *Forster v Silvermere Golf and Equestrian Centre* (1981) 125 Sol Jo 397; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL.

14 As where there is an express or implied agreement between A and B to this effect: *Alfred McAlpine Construction Ltd v Panatown Ltd* (1988) 58 ConLR 47, Times, 11 February, CA, citing *Dunlop v Lambert* (1839) 6 Cl & Fin 600 and *Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL.

Substantial damages would certainly be recoverable where A could show that he suffered some damage by B's breach; see eg *Beswick v Beswick* [1968] AC 58 at 102, [1967] 2 All ER 1197 and at 1221, HL, obiter per Lord

Upjohn, as to what the position would have been had A died leaving any other assets. See also *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92, [1975] 1 WLR 1468, CA (it was assumed that the wife and children were not parties to the holiday contract. But James LJ regarded the £500 as compensation only for the husband's own distress; and this view of the case was supported in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571 at 576, [1980] 1 WLR 277 at 283, HL, per Lord Wilberforce, at 585 and 293 per Lord Russell and at 297 and 588 per Lord Keith); *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA.

15 See para 760 post.

16 *Snelling v John G Snelling Ltd* [1973] QB 87, [1972] 1 All ER 79.

17 Ie under the Supreme Court Act 1981 s 49(3); see para 763 post.

18 *Beswick v Beswick* [1968] AC 58 at 71, [1967] 2 All ER 1197 at 1200-1201, HL, per Lord Reid, at 94 and at 1216 per Lord Pearce, and at 96 and 1217-1218 per Lord Upjohn, overruling *Re Englebach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348; *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124. Other cases supporting the view stated in the text are: *Ashby v Costin* (1888) 21 QBD 401, DC; *Harris v United Kingdom Postal and Telegraph Services Benevolent Society* (1889) 87 LT Jo 272; *Re Davies, Davies v Davies* [1892] 3 Ch 63; *Re Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA; *Re Stapleton-Bretherton, Weld-Blundell v Stapleton-Bretherton* [1941] Ch 482, [1941] 3 All ER 5.

19 *Beswick v Beswick* [1966] Ch 538 at 565, [1966] 3 All ER 1 at 14, CA, per Salmon LJ; [1968] AC 58 at 72, [1967] 2 All ER 1197 at 1201, HL, per Lord Reid, at 96 and at 1217 per Lord Upjohn. It is otherwise if A and B have created a trust of B's promise; see further para 761 post. As to variation of contracts see para 1019 et seq post.

20 *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] ALR 385, 119 CLR 460, Aust HC.

21 *Beswick v Beswick* [1966] Ch 538 at 557, [1966] 3 All ER 1 at 9, CA, per Lord Denning MR; *Gurtner v Circuit* [1968] 2 QB 587 at 596, [1968] 1 All ER 328 at 332, CA, per Lord Denning MR. But see the authorities cited in note 22 infra.

22 As to statements that the action can only be brought by A see *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853, HL, per Viscount Haldane LC; *Beswick v Beswick* [1966] Ch 538 at 565, [1966] 3 All ER 1 at 14, CA, per Salmon LJ (this point was not argued before the House of Lords, but see the remarks of their Lordships cited in note 4 supra); *Gurtner v Circuit* [1968] 2 QB 587 at 599, [1968] 1 All ER 328 at 334, CA, per Diplock LJ and at 606 and 338 per Salmon LJ.

23 As to trusts of promises see para 761 post. If C could always sue by joining A, it would be quite pointless to insist that C must in addition show the existence of a trust. Quære whether A could contract with C to enforce B's promise, and C could then obtain specific performance of that promise to require A to sue B for specific performance of his promise?

24 See the text to notes 11-14 supra.

25 Cf *Allen v Waters & Co* [1935] 1 KB 200, CA.

26 If the money was intended for the benefit of C, it may be that, on recovery by A, the money becomes subject to a trust for C: *Beswick v Beswick* [1966] Ch 538 at 561, [1966] 3 All ER 1 at 11, CA, per Danckwerts LJ. As to trusts of contractual promises see para 761 post.

27 To give C no rights in the money is consistent with the view that C could not force A to sue B (see the text to notes 20-21 supra); but it is inconsistent with the following: (1) A may sue B for specific performance in favour of C (see the text to note 15 supra); (2) if B does perform his promise, C may be able to retain the benefit conferred (see the text to note 16 supra).

## UPDATE

### 749 Attempts to confer benefits on strangers

NOTE 5--Resale Prices Act 1976 repealed: Competition Act 1998 Sch 14 Pt I.

NOTE 14--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (exception to general common law rule can only be justified where necessary to avoid absence of remedy).



NOTE 17--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(i) The Doctrine of Privacy/750. Attempts to impose burdens on strangers.

### **750. Attempts to impose burdens on strangers.**

The general common law rule is that a contract cannot impose burdens on anybody who is not a party to it<sup>1</sup>; A and B cannot contract that C shall be subject to a burden in such a way that B may enforce that burden against C in contract even if C has actual notice of that provision<sup>2</sup>. Thus, B could not in his own right<sup>3</sup> and as against C enforce any of the following promises made by A to B<sup>4</sup>: a restrictive covenant on the use of goods<sup>5</sup>; a restriction on the price<sup>6</sup> at which goods might be sold<sup>7</sup>; a promise that B's liability in tort to C should be excluded<sup>8</sup>. On the other hand, the agreement between A and B might impose liabilities on C indirectly, as for instance where it creates in favour of B a lien<sup>9</sup> or an irrevocable licence<sup>10</sup>, or as regards consequential loss<sup>11</sup>.

Exceptionally, there are some restrictions arising out of a contract between A and B which may be directly enforceable by B against C. For instance an option to purchase a chattel may be specifically enforceable<sup>12</sup>; and subject to statutory limitations, restrictions on the use or disposition of patented goods may be enforceable against persons acquiring such goods with notice of the restriction<sup>13</sup>. A restrictive covenant may be directly enforceable in a sale or lease of land, on the use of the land<sup>14</sup>, and possibly even in the case of the sale or lease of a ship<sup>15</sup>. A contract to hire a chattel may create a proprietary interest which is good against third parties<sup>16</sup>; there may also be a novation<sup>17</sup>; and an action in tort may lie against C for interfering with the contract between A and B<sup>18</sup>.

1 As to the general rule see para 748 ante; and for the exceptions see para 754 et seq post.

2 The reason is that it is unfair that C should have a contractual burden imposed upon him without his consent.

3 If A had contracted with C that C should bear this burden, B might directly enforce it as legal representative of A: see para 749 note 3 ante. Quære whether in these circumstances B might obtain specific performance of his agreement with A, by requiring A to sue C (cf the text to para 749 note 15 ante)?

4 In an appropriate case, B might be able to sue A for damages, eg on a guarantee that C would abide by the restriction, or a promise to indemnify B if C did not do so; and see para 749 note 9 ante.

5 *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787. But see further note 15 infra.

6 Such restrictions are now subject to statute: see para 763 post.

7 *McGruther v Pitcher* [1904] 2 Ch 306, CA, following *Taddy & Co v Sterious & Co* [1904] 1 Ch 354. Cf *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, HL (the agreement was between the appellants (B) and Messrs Dew (A)). For the ratio of this case see para 749 note 5 ante).

8 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL (an agreement between the carriers (A) and the stevedores (B) that B should have the benefit of the terms, conditions and exceptions of the bill of lading; see [1959] 2 QB 171 at 173, [1959] 2 All ER 289 at 291); *Moyer Stainless and Alloy Co Ltd v Canadian Overseas Shipping Ltd* [1973] 2 Lloyd's Rep 420. Cf *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC; and see para 818 post.

9 *Faith v East India Co* (1821) 4 B & Ald 630; *Tappenden v Artus* [1964] 2 QB 185, [1963] 3 All ER 213, CA; and see LIEN.

10 *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA; and see LANDLORD AND TENANT.

11 *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA* [1996] 2 Lloyd's Rep 383 (the Sale of Goods Act 1979 s 51; and see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 294).

12 *Falcke v Gray* (1859) 4 Drew 651, as explained by Peterson J in *Erskine Macdonald Ltd v Eyles* [1921] 1 Ch 631 at 641; and see further SPECIFIC PERFORMANCE.

13 See the Patents Act 1977 s 44; *Dunlop Rubber Co Ltd v Longlife Battery Depot* [1958] 3 All ER 197, [1958] 1 WLR 1033; and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARAS 385, 506.

14 See para 760 post. The doctrine does not apply to a mere contractual licence: *Clore v Theatrical Properties Ltd and Westby & Co Ltd* [1936] 3 All ER 483, CA.

15 In *De Mattos v Gibson* (1858) 4 De G & J 276 (an application for an interlocutory injunction to prevent the mortgagee of a ship (C) from disregarding the rights of the charterer (B); the injunction was later refused on the grounds that there had been no interference with B's rights), Knight Bruce LJ said (at 282): 'Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another, with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller'. This principle came to be associated with the rule in *Tulk v Moxhay* (1848) 2 Ph 774 (see para 760 text and note 14 post), and was subsequently followed in: *Messageries Imperiales Co v Baines* (1863) 7 LT 763 (charterparty); *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, PC. But the rule in *Tulk v Moxhay* supra has developed in a manner clearly inapplicable to goods, and the dictum of Knight Bruce LJ has received considerable criticism: see *LCC v Allen* [1914] 3 KB 642 at 658-659, CA, obiter per Buckley LJ; *Barker v Stickney* [1919] 1 KB 121 at 131-132, CA, per Scrutton LJ; *Clore v Theatrical Properties Ltd and Westby & Co Ltd* [1936] 3 All ER 483 at 490, CA, per Lord Wright MR; *Greenhalgh v Mallard* [1943] 2 All ER 234 at 239, CA, per Lord Greene MR; *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146 at 168, [1958] 1 All ER 787 at 797 (charterparty), where Diplock J refused to follow *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* supra, or, alternatively, was prepared to distinguish it on any of the following grounds: (1) C must have actual notice of B's rights; (2) the only remedy available under the doctrine in *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* supra is an injunction; (3) it was not C's acts, but Crown requisition, which was inconsistent with B's rights: see *Port Line Ltd v Ben Line Steamers Ltd* supra at 172 and at 800.

It therefore seems clear that, at very least, the authority of the decision in *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* supra has been severely shaken; that the generality of the dictum by Knight Bruce LJ has been denied; and that the principle is unlikely to be applied outside the limited field of ships and their charters, unless, perhaps, it can be supported under the good faith doctrine, as to which see para 613 ante.

16 In *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146 at 166, [1958] 1 All ER 787 at 796, Diplock J said: 'The time charterer has no proprietary or possessory rights in the ship ...'. This therefore leaves open the possibility that if B has acquired such rights in a chattel under a contract, eg of hire, such rights may be protected in contract as against C who subsequently acquires the chattel. For the rights of a bailee as against third parties see generally BAILMENT vol 3(1) (2005 Reissue) para 89.

17 *Pacific Wash-A-Matic Ltd v RO Booth Holdings Ltd* (1978) 88 DLR (3d) 69, BC SC; and see generally para 1036 et seq post.

18 *Law Debenture Trust Corp plc v Ural Caspian Oil Corp Ltd* [1995] Ch 152, [1995] 1 All ER 157, CA (sale by A to B of shares of a company which had expropriated property in Russia, on condition that any subsequent Russian government compensation paid to B should be held by B as trustee of A and that B would impose a similar covenant on any sub-sale; L sold the shares to C1; C1 sold to C2, etc, without any such covenant. Held: C2 was a stranger to the original sale and would only be liable in tort if B1's transfer was tortious; and that would not be so unless an injunction had previously been taken out against C1); and see para 611 note 2 ante.

## UPDATE

### 750 Attempts to impose burdens on strangers

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(i) The Doctrine of Privacy/751. Multilateral contracts.

### 751. Multilateral contracts.

It may be particularly difficult to resolve questions of consideration and privacy where there are several parties to a contract<sup>1</sup>. Of course, it may be possible to divide the parties into two or more clearly separate groups, each group contracting with all the others<sup>2</sup>. In such a case, there may be difficulty over the following points: first, whether each individual member of a group is jointly and/or severally liable to the other groups<sup>3</sup>; secondly, whether the parties within a group contract have entered into contractual relationships each with the other or others in the group<sup>4</sup>.

Leaving aside industrial collective agreements<sup>5</sup> and the shareholders of registered companies<sup>6</sup>, this second question arises in particular in two situations:

- 67 (1) a person may join a club or other unincorporated association. Apart from the rather different situation in partnerships<sup>7</sup>, the position will frequently be that the person joining deals exclusively with the club secretary and remains unaware of the identity of at least some of the other members of the club. Nevertheless, the person joining may in fact be contracting with all the other members of the club<sup>8</sup>, but will not necessarily do so<sup>9</sup>;
- 68 (2) a person may enter a race or other competition, again possibly dealing exclusively with a secretary or competition organiser<sup>10</sup>. In some such cases, it will be found that the entrant has contracted only with the organising committee<sup>11</sup>; but in others the entrant may contract with all the other entrants as well<sup>12</sup>.

1 As to the general rule of privacy of contract see para 748 ante.

2 Eg a contract between two partnerships, or between two other unincorporated associations.

3 Eg *Touche Ross & Co v Colin Baker* [1992] 2 Lloyd's Rep 207, HL. As to joint and several promises see para 1079 et seq post.

4 *Rayfield v Hands* [1960] Ch 1, [1958] 2 All ER 194 (shareholder against shareholder); and see generally COMPANIES.

5 See para 752 post.

6 See para 763 post.

7 As to the relationship between partners see the Partnership Act 1890 ss 19-31 (as amended); and PARTNERSHIP.

8 *Hybart v Parker* (1858) 4 CBNS 209; *Gray v Pearson* (1870) LR 5 CP 568; *Evans v Hooper* (1875) 1 QBD 45, CA.

9 *Ellesmere v Wallace* [1929] 2 Ch 1, CA.

10 This situation may also give rise to problems in analysing the formation of the agreement: see paras 631 note 1, 657 notes 3, 11 ante.

11 As to examples of contracts between the entrant and the organising committee see the cases cited in para 657 note 3 ante.

12 As to examples of contracts between entrants see the cases cited in para 657 note 11 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(i) The Doctrine of Privacy/752. Collective agreements.

## 752. Collective agreements.

The practice of collective bargaining between trade unions and employers (or associations of employers) may have contractual implications at two levels<sup>1</sup>.

First, there is the question of whether the collective agreement is a binding contract, and if so who are the parties to it. A collective agreement may (unusually) be intended to create legal relations<sup>2</sup> and, if that is the case the trade unions and employers<sup>3</sup> involved in the bargaining are clearly parties to any resulting contract<sup>4</sup>. On the other hand, it seems doubtful whether in the ordinary case the members of the bargaining unions would then be parties to the agreement<sup>5</sup>; for the unions would be more likely to act in this regard only as principals<sup>6</sup>, and not as agents on behalf of their members<sup>7</sup>.

Secondly, where the members of a bargaining union are not themselves parties to any resulting 'collective' contract (the usual case), it may be that the terms of that contract or non-contractual agreement are incorporated into the individual contracts of employment either expressly<sup>8</sup> or by implication<sup>9</sup>.

1 As to collective agreements see EMPLOYMENT vol 41 (2009) PARA 1042 et seq.

2 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 179(2); para 720 ante; and EMPLOYMENT vol 41 (2009) PARA 1138.

3 If the negotiations are conducted on the employers' side by an employers' association, then clearly the employers' association is in the position of the employer referred to in the text. Quare whether the members of the association are themselves parties to the agreement: see the text to notes 5-7 infra.

4 This seemed to be assumed in the Terms and Conditions of Employment Act 1959 s 8(1)(a), (b) (repealed).

5 *Young v Canadian Northern Rly Co* [1931] AC 83, PC. It is otherwise if the negotiations are conducted on behalf of a particular person or persons: cf *Deane v Craik* (1962) Times, 16 March; *Edwards v Skyways Ltd* [1964] 1 All ER 494, [1964] 1 WLR 349 (see further note 6 infra). As to the position with regard to unincorporated associations in general see para 751 head (1) ante.

6 To the contrary is *Rookes v Barnard* as reported in [1961] 2 All ER 825 at 827 per Sachs J (there is no mention of this point in [1964] AC 1129, [1964] 1 All ER 367, HL; but it was doubted in [1963] 1 QB 623 at 675, [1962] 2 All ER 579 at 595, CA, per Donovan LJ); *Edwards v Skyways Ltd* [1964] 1 All ER 494, [1964] 1 WLR 349 (it was conceded in this case that the union was acting as agent for the redundant employees (at 499 and at 354); and the court also treated the negotiated terms of the settlement as a standing offer by the company which each individual employee could 'accept') (at 497 and at 353).

7 *Holland v London Society of Compositors* (1924) 40 TLR 440.

8 *Hooker v Lange, Bell & Co* [1937] 4 LJNCCR 199 ('at union rates'); *National Coal Board v Galley* [1958] 1 All ER 91, [1958] 1 WLR 16, CA (the express term 'the national agreement for the time being in force' was held to refer to the collective agreement as varied from time to time); *Camden Exhibition and Display Ltd v Lynott* [1966] 1 QB 555, [1965] 3 All ER 28, CA. Cf *Hulland v William Sanders & Son* [1945] KB 78, [1944] 2 All ER 568, CA; *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL (where this point was conceded). As to incorporation by reference see generally para 688 ante.

As a general rule, the collective agreement could equally be excluded from contracts of employment by express agreement: *Hulland v William Sanders & Son* [1945] KB 78, [1944] 2 All ER 568, CA (decided under the emergency legislation).

9 *McLea v Essex Line Ltd* (1933) 45 Ll L Rep 254; *Tomlinson v London, Midland and Scottish Rly Co* [1944] 1 All ER 537, CA; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, [1991] 4 All ER 563, HL. As to the incorporation into a contract of the terms contained in a written document see generally para 688 ante; and as to implied terms generally see para 778 et seq post.

For a case where there was found to be no such implication see *Young v Canadian Northern Rly Co* [1931] AC 83, PC. There are also many terms in collective agreements which are not appropriate to be incorporated by implication into individual contracts of employment: *Barber v Manchester Regional Hospital Board* [1958] 1 All ER 322 at 327, [1958] 1 WLR 181 at 190 per Barry J.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(i) The Doctrine of Privity/753. Collateral contracts.

### 753. Collateral contracts.

A contract between A and B may be accompanied by a collateral contract between B and C, whereby C makes a promise to B in return for B entering into the contract with A or doing some other act for the benefit of C<sup>1</sup>. Before B can succeed in an action against C for breach of C's promise, B must prove the following<sup>2</sup>: (1) that C made a promise to B<sup>3</sup> *animo contrahendi*<sup>4</sup>; and (2) in reliance on that promise, B entered into the contract with A or did the other requested act<sup>5</sup>. For example it has been found that there were binding collateral contracts between B and C, whereby C had made an enforceable promise in return for the following acts requested of B: that B was to exercise his right under an existing contract with A to specify that A use C's product in the performance of A's contract with B<sup>6</sup>; that B was subsequently to enter into a contract to purchase some of C's products from A<sup>7</sup>; that B was subsequently to enter into a contract to take some of C's goods on hire-purchase terms from A<sup>8</sup>; that B was to specify under his insurance policy with A that his (B's) car be repaired at C's garage<sup>9</sup>; that B was to warrant his authority to contract as agent<sup>10</sup>; that a carrier (B) was to warrant that a cargo-handler (C) should have the benefit of the exemptions and immunities contained in the bill of lading<sup>11</sup>.

The term 'collateral' promise is also sometimes invoked in situations which do not raise any privity problem at all because there are only two parties: for instance, a warranty in a sale of goods from A to B (statutorily defined as being collateral to the main purpose of the contract)<sup>12</sup>; a warranty by a surgeon as to the success of a vasectomy<sup>13</sup>; an implied collateral contract attached to an invitation to tender that the tender procedure will be followed<sup>14</sup>. The notion of a collateral contract between A and B has also been utilised to avoid the parol evidence rule<sup>15</sup>.

1 *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854 at 856, [1951] 2 All ER 471 at 472 per McNair J. Whilst the dicta cited refer to an 'enforceable warranty', it is clear that the reference is to a separate collateral contract; and the latter terminology will be employed here.

2 *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 QB 170 at 180, [1964] 1 All ER 41 at 45-46 per Edmund Davies J.

3 This must amount to an offer: as to offers generally see para 632 et seq ante.

4 I.e. with the intent of a contracting party: *Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195 at 204, 205, [1969] 2 All ER 504 at 509 per Donaldson J: 'There can be no contract between two parties unless both intend either to enter into contractual relations or so to act toward one another that the law will imply such an intention'. See also *McInerney v Lloyds Bank Ltd* [1973] 2 Lloyd's Rep 389 (affd on other grounds [1974] 1 Lloyd's Rep 246, CA); *Lambert v Lewis* [1982] AC 225, [1980] 1 All ER 978, CA (no collateral contract on the basis of the manufacturer's sales literature; affd on other grounds [1982] AC 225, [1981] 1 All ER 1185, HL); *Independent Broadcasting Authority v BICC Construction Ltd* [1980] Abr para 485, HL.

Contrast the position with letters of comfort: see paras 668, 721 ante. As to the intention to create legal relations see generally paras 718-726 ante.

5 The offer by C is to enter into a unilateral contract with B; and the performance of the requested act by B is both the acceptance of that offer (see para 657 ante) and the consideration for it (see para 731 ante). See *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC. C's offer may be implied: see para 657 note 24 ante.

6 *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854, [1951] 2 All ER 471.

7 *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 QB 170, [1964] 1 All ER 41.

8 *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All ER 1102; *Andrews v Hopkinson* [1957] 1 QB 229, [1956] 3 All ER 422. Cf para 672 note 20 ante. If the transaction is regulated, in some circumstances C is

deemed to be the statutory agent of A: see the Consumer Credit Act 1974 s 56(2); and CONSUMER CREDIT vol 9(1) (Reissue) para 177.

9 *Charnock v Liverpool Corpn* [1968] 3 All ER 473, [1968] 1 WLR 1498, CA. Seemingly, the insured will not usually be bound to pay the repairer under this contract any more than the 'excess' under his insurance policy: *Charnock v Liverpool Corpn* supra at 476 and at 1504 per Harman LJ, citing *Godfrey Davis Ltd v Culling and Hecht* [1962] 2 Lloyd's Rep 349 at 350, CA, per Upjohn LJ. See also *Cooter and Green Ltd v Tyrrell* [1962] 2 Lloyd's Rep 377, CA.

10 *Pollway Ltd v Abdullah* [1974] 2 All ER 381, [1974] 1 WLR 493, CA (land knocked down to C at an auction; C gave a cheque for the deposit that he subsequently stopped). As to an agent's warranty of authority see AGENCY vol 1 (2008) PARA 160.

11 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257, [1981] 1 WLR 138, PC.

12 See the Sale of Goods Act 1979 s 61(1); para 994 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 63.

13 *Thake v Maurice* [1986] QB 644, [1984] 2 All ER 513 (affd on other grounds [1986] QB 644, [1986] 1 All ER 497, CA); and cf *Eyre v Measday* [1986] 1 All ER 488, CA.

14 *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1195, CA.

15 *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 ER 733; *Gill v Cape Contracts Ltd* [1985] IRLR 499, NI; *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853; *Barnett v Peter Cox Group Ltd* (1995) 45 ConLR 131, CA; *Wake v Renault (UK) Ltd* (1996) Times, 1 August, 15 Tr LR 514; *Gates v City Mutual Life Assurance Society Ltd* [1986] LRC (Comm) 264, Aust HC. See also the cases cited in para 627 note 5 ante. As to the parol evidence rule see paras 622, 690-700 ante.

## UPDATE

### 753 Collateral contracts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privacy/A. AT COMMON LAW/754. Introduction.

## (ii) Exceptions to the Doctrine of Privacy

### A. AT COMMON LAW

#### 754. Introduction.

Partly for reasons of expediency, even the common law was forced to accept a number of real or apparent exceptions to the doctrine of privacy<sup>1</sup> in relation to:

- 69 (1) agency<sup>2</sup>;
- 70 (2) assignment of choses in action<sup>3</sup>;
- 71 (3) carriage of goods<sup>4</sup>;
- 72 (4) commercial letters of credit<sup>5</sup>;
- 73 (5) covenants concerning land<sup>6</sup>;
- 74 (6) claims in tort<sup>7</sup>;
- 75 (7) proprietary or possessory rights<sup>8</sup>;
- 76 (8) registered companies<sup>9</sup>; and
- 77 (9) sub-bailments<sup>10</sup>.

1 As to the doctrine of privacy see paras 748-753 ante.

2 See para 755 post.

3 Assignment of choses in action takes place when the liabilities imposed or the rights acquired under a contract between A and B are transferred to C, who was not a party to the original contract: *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA (the parties contemplated assignment when contracting); *British Gas Trading Ltd v Eastern Electricity* (1996) Times, 29 November (power to assign subject to consent not to be unreasonably withheld). For the general power of assignment of choses in action see CHOSSES IN ACTION vol 13 (2009) PARA 13 et seq. Such assignment may be made either by act of the parties or by operation of law. As to assignment by act of the parties see para 757 post; and as to assignment by operation of law see para 758 post.

4 See para 756 post.

5 A contract for the sale of goods may require A (the buyer) to open a letter of credit with B (a bank) in favour of C (the seller). Besides the contract of sale (from C to B), there is, of course, a contract between A and B; but additionally, where the letter of credit is expressed to be irrevocable and has been confirmed by B, then once C acts on that credit it may be enforced by C against B. This has been explained on the basis that there is a collateral contract between B and C: *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318 at 321-322 per Rowlatt J. But see *McInerney v Lloyds Bank Ltd* [1973] 2 Lloyd's Rep 389; affd on other grounds [1974] 1 Lloyd's Rep 246, CA. As to collateral contracts see generally para 753 ante; and for the position as between B and C see generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq.

6 A covenant entered into between A (a landlord) and B (his tenant) not only binds the parties, but may also be of a type to run with the land: see the second resolution in *Spencer's Case* (1583) 5 Co Rep 16a; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 559. See also para 640 note 24 ante. Where this is the case, both the benefit and the burden of that covenant may be enforceable by and against the successors in title of A and B on the basis of 'privity of estate': see eg *Official Custodian for Charities v Mackey (No 2)* [1985] 2 All ER 1016, [1985] 1 WLR 1308. Whilst the benefit of a covenant runs with the land (*Spencer's Case* supra fourth and sixth resolutions), the general common law rule was that the burden of a covenant did not do so, except in the case of leases (*Austerberry v Oldham Corp* (1885) 29 ChD 750, CA); and see further EQUITY; LANDLORD AND TENANT; REAL PROPERTY. However, the burden of a covenant might run with the land in equity: see para 760 post; and for a statutory provision with regard to the benefit of covenants see para 617 ante.

7 See para 759 post.

8 Where a contract between A and B grants B a possessory or proprietary interest in a chattel, it may be that B can enforce that right against C, a person acquiring the chattel from B: see para 750 note 15 ante. Quære whether this would be so where C was a bona fide purchaser for value?

9 Whilst a registered company has a separate legal personality, so that even the moving force behind it cannot at common law sue on the company's contracts (*Newborne v Sensolid (Great Britain) Ltd*[1954] 1 QB 45, [1953] 1 All ER 708, CA; and see para 706 note 6 ante), he may be able to do so where the corporate veil is pierced (*Jones v Lipman*[1962] 1 All ER 442, [1962] 1 WLR 832; and see COMPANIES vol 14 (2009) PARA 121). As to pre-incorporation contracts see para 755 note 9 post.

10 See para 817 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privacy/A. AT COMMON LAW/755. Agency.

### 755. Agency.

The relationship of agency arises when A (the principal) authorises B (the agent) to act on his behalf in making a contract with C (the third party)<sup>1</sup>. Amongst the legal consequences of the agency relationship between A and B are the following: the general rule is that B is neither liable under<sup>2</sup> nor entitled to enforce<sup>3</sup> a contract he makes on behalf of A, whereas there is a direct contractual relationship between A and C<sup>4</sup>; but exceptionally B may be liable or entitled under that contract because he contracts personally<sup>5</sup>, or as co-principal<sup>6</sup>, or acts for a principal who is undisclosed<sup>7</sup>, unnamed<sup>8</sup> or non-existent<sup>9</sup>. Even if it be only an apparent exception to the doctrine of privity where B, by acting within his actual authority<sup>10</sup>, binds A to a contract with C, there is a real exception where B does so notwithstanding that his act is unauthorised, or where A becomes a party to a contract by reason of the doctrines of ratification, undisclosed principal or agency by necessity<sup>11</sup>. The principles relating to agency have also been used to explain: (1) how the benefit of an exemption clause in a bill of lading might be extended to cover all who assist in the transportation process<sup>12</sup>; and (2) insurance by persons with a limited interest in property<sup>13</sup>.

1 As to contracts with unincorporated associations see paras 765-766 post.

2 *Ferguson v Wilson* (1866) 2 Ch App 77; *Fairline Shipping Corp v Adamson* [1975] QB 180, [1974] 2 All ER 967.

3 See AGENCY vol 1 (2008) PARAS 157-159, 167.

4 See AGENCY vol 1 (2008) PARA 125. For instance, a contract whereby limitation of liability under the Merchant Shipping Act 1995 ss 185(1), (2), 186(1)-(3), (5), Sch 7 (see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1042 et seq) is excluded may, it seems, benefit persons not named as parties if it can be inferred that the shipowners were contracting not only for themselves but also as agents for their masters and crew: see *The Kirknes* [1957] P 51, [1957] 1 All ER 97; cf the dissenting judgment of Lord Denning in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 489-491, [1962] 1 All ER 1 at 20-22, HL; and see generally para 816 post.

5 See eg *Basma v Weekes* [1950] AC 441, [1950] 2 All ER 146, PC. It is sometimes doubtful whether B acted as agent or on his own behalf: see eg *P Samuel & Co Ltd v Dumas* [1923] 1 KB 592, CA (affd [1924] AC 431, HL); *Henry Browne & Son Ltd v Smith* [1964] 2 Lloyd's Rep 476. There may be similar difficulties where B employs a sub-agent: see paras 606 ante, 818 note 4 post; and AGENCY vol 1 (2008) PARAS 54-56. In respect of collective bargaining in industry see para 752 note 8 ante.

6 Eg (1) contracts by A also on behalf of his/her spouse (B) with C (*Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd's Rep 257 at 262; affd on damages [1980] 3 All ER 696, [1981] 1 WLR 120, CA); (2) a partner acting for a partnership. As to joint promises see para 1079 et seq post. Cf *Hannam v Bradford City Council* [1970] 2 All ER 690, [1970] 1 WLR 937, CA; *Kepong Prospecting Ltd v Schmidt* [1968] AC 810, PC. In the case of spouses contracting with C, courts have alternatively analysed the situation as each spouse separately contracting with C (*Lockett v A & M Charles* [1938] 4 All ER 170). Similar alternative analyses have been employed with sub-agents, eg forwarding agents (*Jones v European General Express Co Ltd* (1920) 25 Com Cas 296; *Salsi v Jetspeed Air Services* [1977] 2 Lloyd's Rep 57; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep 49).

7 See AGENCY vol 1 (2008) PARA 125.

8 B is generally liable where he purports to act for an unnamed principal, but in fact acts for himself: *Schmaltz v Avery* (1851) 16 QB 655; and see AGENCY vol 1 (2008) PARAS 157, 167.

9 *Kelner v Baxter* (1866) LR 2 CP 174. As to pre-incorporation contracts see the Companies Act 1985 s 36C (as added).

10 See note 5 supra.

11 See further AGENCY vol 1 (2008) PARAS 24, 123.

12 See para 816 post.

13 See para 764 post.

## **UPDATE**

### **755 Agency**

NOTE 9--Companies Act 1985 s 36C replaced by Companies Act 2006 s 51: see COMPANIES vol 14 (2009) PARA 66.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVITY/(2) PRIVITY/(ii) Exceptions to the Doctrine of Privity/A. AT COMMON LAW/756. Carriage of goods.

## **756. Carriage of goods.**

In the case of a contract for the carriage of goods the contract is, in the absence of express agreement, considered to be made between the carrier and the person at whose risk the goods are carried, who is in most cases the consignee<sup>1</sup>, in which case, therefore, there is no real exception to the doctrine of privity<sup>2</sup>. Where the goods are lost or damaged, there may be prima facie liability in the tort of negligence<sup>3</sup>, perhaps because there is a sub-bailment<sup>4</sup>. The immunity which may be secured by the bill of lading for all those who assist in the process of transportation has been explained by way of agency<sup>5</sup>.

1 See eg the Carriage of Goods by Sea Act 1924 s 2(1); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 752 et seq.

2 As to the doctrine of privity see para 748 et seq ante; and as to common law exceptions see generally paras 754-755 ante.

3 See para 759 post. It is otherwise where there is no privity of contract between the carrier and the buyer who has not become the owner of the goods: see para 759 note 16 post.

4 See para 817 post.

5 See para 755 note 4 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privacy/A. AT COMMON LAW/757. Assignment by act of the parties.

## 757. Assignment by act of the parties.

Assignment by act of the parties may be an assignment either of rights or of liabilities under a contract; or, as it is sometimes expressed, an assignment of the benefit or the burden of the contract<sup>1</sup>. Assignment of the benefit of a contract is dealt with elsewhere in this work<sup>2</sup>.

As a rule a party to a contract cannot transfer his liability under that contract without the consent of the other party<sup>3</sup>. This rule<sup>4</sup> applies both at common law and in equity<sup>5</sup> and is generally unaffected by statute<sup>6</sup>.

There is, however, no objection to the substituted (vicarious) performance by a third person of the duties of a party to the contract where those duties are not connected with the skill, character, or other personal qualifications of that party<sup>7</sup>. In such circumstances, however, the liability of the original contracting party is not discharged, and the only effect is that the other contracting party, in addition, may be able to look to the third party for the performance of the contractual obligations<sup>8</sup>.

By the consent of all parties, liability under a contract may be transferred so as to discharge the original contract. Such a transfer is not an assignment of a liability but a novation of the contract<sup>9</sup>.

1 See *Bowater & Sons v Mirror of Life Co Ltd* (1902) 50 WR 381.

2 See CHOSSES IN ACTION vol 13 (2009) PARAS 6, 13 et seq. As to non-assignable choses in action see para 758 post; and as to the creation of a trust of a non-assignable promise see para 761 note 3 post.

3 *Robson v Drummond* (1831) 2 B & Ad 303. 'You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract': *Humble v Hunter* (1848) 12 QB 310 at 317; see also *Johnson v Raylton, Dixon & Co* (1881) 7 QBD 438, CA. See further CHOSSES IN ACTION vol 13 (2009) PARAS 13 et seq, 92 et seq.

Distinguish the assignment of a limited benefit: see eg *Britain and Overseas Trading (Bristles) Ltd v Brooks Wharf and Bull Wharf Ltd* [1967] 2 Lloyd's Rep 51. Moreover, where a contract involves mutual rights and obligations, an assignee of a right may not be able to enforce that right without fulfilling the correlative obligation; as to non-performance as a bar to enforcement see paras 961-978 post.

4 As to covenants running with the land see paras 754 ante, 760 post; and EQUITY; LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 559; REAL PROPERTY.

5 *Tolhurst v Associated Portland Cement Manufacturers (1900), Associated Portland Cement Manufacturers (1900) v Tolhurst* [1902] 2 KB 660 at 668, 677, CA; affd sub nom *Tolhurst v Associated Portland Cement Manufacturers (1900), Tolhurst v Associated Portland Cement Manufacturers (1900) and Imperial Portland Cement Co* [1903] AC 414, HL.

6 It is not, for example, affected by the Law of Property Act 1925 s 136 (as amended): see *Tolhurst v Associated Portland Cement Manufacturers (1900), Associated Portland Cement Manufacturers (1900) v Tolhurst* [1902] 2 KB 660 at 670, 676, CA; affd on other grounds sub nom *Tolhurst v Associated Portland Cement Manufacturers (1900), Tolhurst v Associated Portland Cement Manufacturers (1900) and Imperial Portland Cement Co* [1903] AC 414, HL; and see CHOSSES IN ACTION vol 13 (2009) PARA 41 et seq; SALE OF LAND.

7 *Johnson Matthey & Co v Constantine Terminals Ltd and International Express Co Ltd* [1976] 2 Lloyd's Rep 215. Where a wagon company let a number of railway wagons to the defendants at an annual rent, and agreed to keep them in repair, it was held that the company's assignees were equally competent to keep the wagons in repair, and that the assignment of the company's liability did not put an end to the contract: *British Waggon Co v Lea* (1880) 5 QBD 149, DC. See further para 926 post; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) paras 55-60; CHOSSES IN ACTION vol 13 (2009) PARA 100.

8 The agreement between the original contracting party and the third party does not of itself confer any rights upon the other party. However, express agreement or the conduct of all those parties may effect a novation of the old contract and give the other party rights against the third party; as to novation generally see note 9 *infra*; and para 1036 *et seq post*.

9 See para 1036 *et seq post*. On a sale of goods, a condition cannot generally run with, or be attached to, the goods so as to bind the purchaser: see para 750 notes 5, 15 *ante*; and SALE OF GOODS AND SUPPLY OF SERVICES.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVACY/(2) PRIVACY/(ii) Exceptions to the Doctrine of Privacy/A. AT COMMON LAW/758. Assignment by operation of law.

### **758. Assignment by operation of law.**

The rights and liabilities of either party to a contract may in certain circumstances be assigned by operation of law, as, for example, when a party dies or becomes bankrupt<sup>1</sup>. Covenants relating to land, such as covenants entered into between the parties to a lease or between vendor and purchaser may in certain circumstances be enforceable by, or bind, their successors in title<sup>2</sup>.

No right or liability of a purely personal nature (that is one dependent on the skill or qualification of one party) can be assigned by operation of law<sup>3</sup>. Thus, the personal representatives of a deceased may not sue or be sued on such a contract made by the deceased and the contract is discharged by his death<sup>4</sup>. But the personal representatives may sue for any money earned by the deceased under the contract<sup>5</sup>, or even for money accruing after death, if it appears that the parties intended that the remuneration should continue to be payable after the ending of the contract<sup>6</sup>. If a party to a contract assigns his rights in equity before he dies, his personal representatives continue to represent him for the purpose of joining or being joined with the assignee in suing the debtor<sup>7</sup>.

Neither the rights nor liabilities of a party to a contract are assigned by his subsequently becoming a person suffering from mental disorder. Judgment may be recovered against him<sup>8</sup>, and he may sue on the contract, either by his next friend or committee, as the case may be<sup>9</sup>.

1 See the text and notes 2-9 *infra*; and para 1067 *et seq post*. As to assignment by operation of law see further CHOSER IN ACTION vol 13 (2009) PARA 86 *et seq*. As to the assignment of contracts of service on the restructuring of a company see CHOSER IN ACTION vol 13 (2009) PARA 100.

2 As to covenants contained in leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 132; and as to covenants on the sale of land see EQUITY; REAL PROPERTY; SALE OF LAND.

3 See also CHOSER IN ACTION vol 13 (2009) PARA 100.

4 *Chamberlain v Williamson* (1814) 2 M & S 408; *Finlay v Chirney* (1888) 20 QBD 494, CA; *Phillips v Alhambra Palace Co* [1901] 1 KB 59 at 63; *Shipman v Thompson* (1738) Willes 103 at 104n; *Farrow v Wilson* (1869) LR 4 CP 744; *Phillips v Jones* (1888) 4 TLR 401; *Blades v Free* (1829) 9 B & C 167; *Foster v Bates* (1843) 12 M & W 226; *Campanari v Woodburn* (1854) 15 CB 400; *Friend v Young* [1897] 2 Ch 421; *Pool v Pool* (1889) 58 LJP 67; *Tasker v Shepherd* (1861) 6 H & N 575; *Graves v Cohen* (1929) 46 TLR 121. As to the principle that a personal contract is frustrated if the promisor becomes incapable of performing it see para 903 *post*; and for the effect of death on contracts generally see para 1078 *post*.

5 *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311.

6 *Wilson v Harper* [1908] 2 Ch 370; and see *Robey v Arnold* (1898) 14 TLR 220, CA; *Salomon v Brownfield and Brownfield Guild Pottery Society Ltd* (1896) 12 TLR 239; *Bilbee v Hasse* (1889) 5 TLR 677; *affd* (1890) Times, 16 January, CA; and *cf Nayler v Yearsley* (1860) 2 F & F 41; *Boyd v Mathers* (1893) 9 TLR 443, CA; *Morris v Hunt* (1896) 12 TLR 187; *Gerahty v Baines & Co Ltd* (1903) 19 TLR 554; *Knight v Burgess* (1864) 33 LJ Ch 727; and *Weare v Brimsdown Lead Co Ltd* (1910) 103 LT 429.

7 *Brandt v Heatig* (1818) 2 Moore CP 184; and see further EXECUTORS AND ADMINISTRATORS.

8 See *Re Leavesley* [1891] 2 Ch 1, CA.

9 See *Farnham v Milward & Co* [1895] 2 Ch 730 at 735. As regards the position of a receiver in relation to income and the estate of a person of unsound mind, and as regards vesting orders, see MENTAL HEALTH vol 30(2) (Reissue) para 723.





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### 759. Claims in tort.

Facts which constitute a breach of the contract between A and B may also give rise to a claim in tort<sup>1</sup>; and, in such a case, C, who is not a party to that contract but has such a claim in tort, sometimes may indirectly enforce that contract.

First, the breach of contract may amount to the tort of negligence<sup>2</sup>; but C may not bring such an action unless the breach of contract is also a breach of a duty of care owed to him<sup>3</sup>. For instance, such a duty of care has been placed upon the following professional advisers: insurance brokers<sup>4</sup>; safety consultants<sup>5</sup>; solicitors<sup>6</sup>; valuers and surveyors<sup>7</sup>. The breach of that duty to C may arise from A's negligent act<sup>8</sup> or misstatement<sup>9</sup>, provided there is sufficient 'proximity' between A and C to give rise to a duty of care. With regard to negligent acts, an earlier more generous view of the requisite proximity<sup>10</sup> has since been doubted<sup>11</sup>; and it may in any event be limited by a contractual provision<sup>12</sup>. In the case of negligent misstatements, the proximity test has also restricted the liability of auditors (A) to those whose statements were made for the purposes of the transaction into which C entered<sup>13</sup>; has usually denied liability where C suffered only economic loss<sup>14</sup>; and in respect of property damage has denied liability in so far as A indirectly supplied that property to C<sup>15</sup>, or where C has no title to the property<sup>16</sup>.

Secondly, where C acquires a chattel from B with actual knowledge of the terms of a contract between A and B affecting it, and the acquisition or use of that chattel is inconsistent with that contract between A and B, C may be liable to A for the tort of wrongful interference with contractual rights<sup>17</sup>. Thirdly, where C threatens to break his contract with B, and thereby induces B to break his (B's) contract with A, A may be entitled to sue C for the torts of unlawful interference with trade<sup>18</sup> and conspiracy<sup>19</sup>. Fourthly, there is some authority that an action in restitution may lie in respect of a benefit which A received under a contract with B if he then failed to perform his promise to B to make a payment to C<sup>20</sup>.

1 As between A and B see para 610 ante; as between A and C see para 611 ante.

2 *Meux v Great Eastern Rly Co* [1895] 2 QB 387, CA, distinguishing *Alton v Midland Rly Co* (1865) 19 CBNS 213. For example the contract might operate as a licence to C to be on B's premises or vehicles, and so raise a duty of care between B and C; cf *Austin v Great Western Rly Co* (1867) LR 2 QB 442; see also the Occupiers' Liability Act 1957 s 2; and NEGLIGENCE vol 78 (2010) PARA 32 et seq.

3 *Playford v United Kingdom Telegraph Co* (1869) LR 4 QB 706 (mistake in telegram); *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1, CA (misdelivery of telegram); *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL (contra *Winnipeg Condominium Corp No 36 v Bird Construction Co* (1995) 121 DLR (4th) 193, SCC); and see generally NEGLIGENCE. As to sub-bailments see para 817 post. There is no longer an inland telegram service: see para 682 ante.

4 *Punjab National Bank v de Boinville* [1992] 3 All ER 104, [1992] 1 WLR 1138, CA.

5 *Driver v William Willett (Contractors) Ltd* [1969] 1 All ER 665.

6 *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580; *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL.

7 *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 3 All ER 592; and see the case cited in note 9 infra.

8 If A's negligent act in performance of his contract itself causes loss to C: *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580; *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL.

9 If in negligent performance of his contract, A makes a misstatement to C: *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL.

10 *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201, HL (B contracted to build a factory for C, under which contract C nominated A as specialist flooring sub-contractor. The floor was laid negligently. There was no contract between A and C). Distinguish the situation where there is a contract between A and C: *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, CA.

11 See *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL; *Balsamo v Medici* [1984] 2 All ER 304, [1984] 1 WLR 951; *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter, The Ibaraki Maru* [1986] AC 1, [1985] 2 All ER 935, PC; *Muirhead v Industrial Tank Specialties Ltd* [1986] QB 507, [1985] 3 All ER 705, CA; *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL; *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 All ER 135, [1987] 1 WLR 1, CA; *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL.

12 *Southern Water Authority v Carey* [1985] 2 All ER 1077 (third and fourth defendants); *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA. But see *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 166.

13 There is no liability by an auditor making a statutory audit on behalf of a company (B) to subsequent investors or lenders to B who rely on those accounts: *Al Saudi Banque v Clark Pixley (a firm)* [1990] Ch 313, [1989] 3 All ER 361; *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL.

14 Otherwise, it would come perilously close to abrogating the doctrine of privity: see *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758, [1988] 1 All ER 791, CA; *Balsamo v Medici* [1984] 2 All ER 304, [1984] 1 WLR 951; *Marc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211, [1995] 3 All ER 307, HL.

15 Where A sells goods to B, who resells them to C, A is not liable in tort to C for the defective state of the goods: *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 All ER 135, [1987] 1 WLR 1, CA. But see *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201, HL, cited in note 10 supra.

16 *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL.

17 *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208; and see the cases cited in para 611 note 2 ante; see also TORT. The tort may be committed even though B was quite willing to break his contract with A: *Sefton v Tophams Ltd* [1964] 3 All ER 876 at 889, [1964] 1 WLR 1408 at 1425; affd [1965] 1 Ch 1140 at 1161, 1187, [1965] 3 All ER 1 at 9, CA; revsd without reference to this point [1967] 1 AC 50, [1966] 1 All ER 1039, HL. This avoids importing the doctrine of constructive notice (ie by C of B's intention) into the tort; but it is subject to the limitation that no tort is committed if C's interference was not the cause of A's loss: *De Mattos v Gibson* (1858) 4 De G & J 276; *The Lord Strathcona* [1925] P 143.

18 *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL. The House of Lords expressly rejected the suggestion that their decision outflanks the doctrine of privity: Lord Reid (at 1168 and at 374), Lord Hodson (at 1200, 1201 and at 394, 395), Lord Pearce (at 1235 and at 415). See further COMPETITION.

19 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, [1942] 1 All ER 142, HL, and see TORT.

20 *Trident Insurance Co Ltd v Mc Niece Bros Pty Ltd* (1988) 165 CLR 107 at 177 per Gaudron J. But this seems to be an abrogation of the doctrine of privity in just the same way as if an action were allowed in tort (see note 14 supra) and to be inconsistent with *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

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## **B. IN EQUITY**

### **760. The equitable exceptions.**

In addition to the real and apparent exceptions to the doctrine of privity<sup>1</sup> allowed by the common law<sup>2</sup>, there are also some exceptions in equity:

- 78 (1) in some cases, A may obtain a decree of specific performance of his contract with B, requiring B to confer a promised benefit on C. In the leading case<sup>3</sup>, the nephew (B) purchased the business of his uncle (A) in return for a promise by B to pay A's widow (C) an annuity; and, after A's death, C sued B, both as administratrix of her late husband<sup>4</sup> and in her own capacity<sup>5</sup> to enforce the promise<sup>6</sup>. She succeeded as administratrix<sup>7</sup> in obtaining a decree of specific performance requiring B to pay the annuity to herself<sup>8</sup>, the court rejecting her statutory claim<sup>9</sup> and not mentioning her common law claim<sup>10</sup>. It will be noted that, in an ordinary case where A and C are separate persons, the availability of this remedy is dependent on (a) the remedy of specific performance being available to A<sup>11</sup>; (b) the willingness of A to take proceedings<sup>12</sup>; and (c) the fact that it was the intention under the contract that payment should be made to C for his or her own benefit<sup>13</sup>;
- 79 (2) in the case of a sale or lease of land, and particularly where there is a building scheme in prospect, the obligations relating to land and arising under valid restrictive covenants or agreements may, in appropriate circumstances, be enforced in equity against persons who were not parties to the original covenant or agreement<sup>14</sup>;
- 80 (3) a covenant to settle after-acquired property contained in a marriage settlement may be enforced<sup>15</sup> by all persons within the marriage consideration<sup>16</sup>; that is, by the spouses and the issue of the marriage<sup>17</sup>;
- 81 (4) where B makes a promise to A for the benefit of C, C can enforce the promise if A has expressly or impliedly constituted himself trustee for C<sup>18</sup>.

1 As to the doctrine of privity see paras 748-750 ante.

2 See paras 754-759 ante.

3 *Beswick v Beswick*[1968] AC 58, [1967] 2 All ER 1197, HL.

4 Hence in law representing A: see EXECUTORS AND ADMINISTRATORS.

5 I.e. as a stranger to the contract between A and B.

6 The action was argued on three grounds: (1) an action for damages by A and C; (2) an action for specific enforcement by A; and (3) an action by C for damages by virtue of the Law of Property Act 1925 s 56.

7 Their Lordships in *Beswick v Beswick*[1968] AC 58 at 72, [1967] 2 All ER 1197 at 1201, HL, per Lord Reid, at 81 and 1207 per Lord Hodson, at 92-93 and 1215 per Lord Pearce and at 95 and 1217 per Lord Upjohn all assumed that a contract can only be enforced by the parties to it. The House of Lords has several times indicated its willingness to review the position: *Beswick v Beswick* supra at 72 and at 1201; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*[1980] 1 All ER 571 at 583, [1980] 1 WLR 277 at 291, HL, per Lord Wilberforce, at 297-298 and 588-589 per Lord Keith and at 300 and 591 per Lord Scarman; *Swain v Law Society*[1983] 1 AC 598 at 611, [1982] 2 All ER 827 at 832, HL, per Lord Diplock. See also para 748 note 15 ante.

8 *Beswick v Beswick*[1968] AC 58 at 78, 81-82, [1967] 2 All ER 1197 at 1205, 1207-1208, HL, per Lord Hodson, at 91 and 1214 per Lord Pearce and at 101-102 and 1221 per Lord Upjohn. The unanimous House of Lords in this respect confirmed a unanimous Court of Appeal: [1966] Ch 538 at 555, 557, 560-561, [1966] 3 All ER 1 at 8, 9, 11, CA. See also *Gasparini v Gasparini* (1978) 87 DLR (3d) 282, Ont CA. As to specific performance see para 896 post; and SPECIFIC PERFORMANCE.

9 See para 617 notes 18-23 ante.

10 See para 749 note 13 ante.

11 In *Beswick v Beswick*[1968] AC 58, [1967] 2 All ER 1197, HL, it was said that specific performance would be available where 'damages for breach would be a less appropriate remedy' (per Lord Pearce at 88 and at 1212), or 'are inadequate to meet the justice of the case' (per Lord Upjohn at 102 and 1221); and see the situation cited in para 764 note 13 post; see further SPECIFIC PERFORMANCE vol 44(1) (Reissue) para 813 et seq. Cf *Boots v E Christopher & Co*[1952] 1 KB 89, [1951] 2 All ER 1045, CA; *Tanenbaum v Sears* [1971] SCR 67, 18 DLR (3d) 709, Can SC. In circumstances such as those in *Beswick v Beswick* supra, C can enforce the order of specific performance even though he is not a party to the proceedings in which it was obtained: RSC Ord 45 r 9; and see CIVIL PROCEDURE. This could be seen in terms of good faith dealing; see para 613 ante.

12 Lord Denning MR has suggested that C could circumvent the doctrine by suing B and joining A as co-defendant: see *Beswick v Beswick*[1966] Ch 538 at 557, [1966] 3 All ER 1 at 9, CA (see also *Gurtner v Circuit*[1968] 2 QB 587 at 596, [1968] 1 All ER 328 at 331, CA); the point was not mentioned on appeal (see the text to note 11 supra). However, Diplock and Salmon LJ said in *Gurtner v Circuit* supra that the action could be brought only by A: see [1968] 2 QB 587 at 599-606, [1968] 1 All ER 328 at 334-338, CA.

13 *Ashby v Costin*(1888) 21 QBD 401; *Harris v United Kingdom Postal and Telegraph Services Benevolent Society* (1889) 87 LT Jo 272; *Re Davies, Davies v Davies*[1892] 3 Ch 63; *Beswick v Beswick*[1968] AC 58 at 71, 94, 96, [1967] 2 All ER 1197 at 1200-1201, 1216, 1217, HL (on this point overruling *Re Engelbach's Estate*[1924] 2 Ch 348 and doubting *Re Sinclair's Life Policy*[1938] Ch 799, [1938] 3 All ER 124).

14 *Tulk v Moxhay* (1848) 2 Ph 774; and see EQUITY vol 16(2) (Reissue) paras 616, 627. As to covenants running with the land at common law see para 754 note 26 ante; and for the rule that the equitable doctrine does not apply to contractual licences see para 750 note 14 ante.

15 Such a covenant cannot be enforced by volunteers outside the marriage consideration (as to which see para 737 ante), such as either spouse's next-of-kin: *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook*[1965] Ch 902, [1964] 3 All ER 898.

16 This proposition, and the cases cited for it (see note 17 infra), are difficult to reconcile with the modern definition of consideration; but see para 613 ante (good faith dealing). For the meaning of 'consideration' see para 728 ante; and for the rule that consideration must move from the promisee see para 734 ante.

17 *Hill v Gomme* (1839) 5 My & Cr 250 at 254 per Lord Cottenham LC; *Re D'Angibau, Andrews v Andrews*(1880) 15 ChD 228 at 242, CA, per Cotton LJ; *Green v Paterson*(1886) 32 ChD 95 at 107, CA, per Fry LJ; *Re Plumtre's Marriage Settlement, Underhill v Plumtre*[1910] 1 Ch 609 at 618 per Eve J.

18 As to trusts of promises see para 761 post; and for the requirements of a valid trust see generally TRUSTS vol 48 (2007 Reissue) para 604 et seq.

## UPDATE

### 760 The equitable exceptions

NOTE 11--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### 761. Trusts of promises.

Provided it can be shown that A intended to create a trust of B's promise for the benefit of C<sup>1</sup>, C can sue B to enforce the promise if he joins A in the action<sup>2</sup>. As a general rule, C is then beneficially entitled to the benefit of that promise<sup>3</sup> and A has no such right<sup>4</sup>. Such a trust may therefore operate as an exception to the doctrine of privity<sup>5</sup>.

A person may be a trustee<sup>6</sup> not only of a chose in possession, but also of a chose in action<sup>7</sup>. Furthermore, equity held that A might be a trustee of a promise by B to pay money, not to A, but to C<sup>8</sup>; and even the common law sometimes allowed a party to recover more than he had lost on the grounds that he was bound to hold the surplus for a third party<sup>9</sup>. Finally, the House of Lords approved an action by C to compel B to perform a promise made by B under contract with A to pay commission to C<sup>10</sup>.

Although these developments have established a clear exception to the doctrine of privity<sup>11</sup>, the courts have sought to limit that exception by insisting in more recent times on strict proof of an intention on the part of A and B to create a trust of the promise<sup>12</sup>. So far, the law of trusts has only been applied as a means of avoiding the doctrine of privity in relation to promises to pay money or transfer property; it might conceivably be applied to other kinds of promises, such as to hold the benefit of an exemption clause for C<sup>13</sup>; but the recent judicial tendency to confine the scope of the trust exception makes this unlikely.

1 As to intention to create a trust see para 762 post.

2 As a general rule, A must be joined: see para 749 note 21 ante. However, B may waive this requirement: see eg *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, HL. Cf assignments, as to which see CHOSSES IN ACTION vol 13 (2009) PARA 13 et seq.

3 See *Don King Productions Inc v Warren* [1988] 2 All ER 608 (trust of non-assignable promise). As to non-assignable promises see para 757 ante. Compare the position where there is no trust: see para 749 head (1) ante.

4 *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA. For an exceptional case where A was held entitled to recover for his own benefit see *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA (but this decision may turn on the language of the statute creating the trust: see para 764 note 8 post).

5 It has been argued that in equity, a person for whose benefit a contract has been entered into had a remedy in equity against the person with whom it was expressed to be made, because the court would deem the latter a trustee for the former; and that, since the Supreme Court of Judicature Act 1873 (repealed), equity must prevail: *Drimmie v Davies* [1899] 1 IR 176 at 182 (decision that specific performance might be obtained in favour of C by the executors of A: as to which see para 760 note 8 ante). However, it is clear that C will only succeed where he can show a trust, and that the mere fact that the promise is made for the benefit of C is today insufficient to create a trust: see para 762 post.

6 As to the essentials of a valid trust see TRUSTS vol 48 (2007 Reissue) para 604 et seq.

7 *Tailby v Official Receiver* (1888) 13 App Cas 523, HL; and see EQUITY; PERSONAL PROPERTY. As to equitable assignments of choses in action see CHOSSES IN ACTION vol 13 (2009) PARAS 3, 24 et seq.

8 *Tomlinson v Gill* (1756) Amb 330; *Gregory and Parker v Williams* (1817) 3 Mer 582; *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL (subject matter of the trust was the money, not a promise). See further EQUITY; GIFTS.

9 See eg *Lamb v Vice* (1840) 6 M & W 467; *Robertson v Wait* (1853) 8 Exch 299; *The Winkfield* [1902] P 42, CA; *Prudential Staff Union v Hall* [1947] KB 685. See also *Crowden v Aldridge* [1993] 3 All ER 603, [1993] 1 WLR 433 (no contract; but direction to executors in favour of third party).

10 *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801, HL. But see *Marcan Shipping (London) Ltd v Polish Steamship Co, The Manifest Lipkowsky* [1989] 2 Lloyd's Rep 138, CA.

11 See note 5 *supra*.

12 See para 762 *post*.

13 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC; and see para 813 note 6 *post*. However, this view was rejected in *Southern Water Authority v Carey* [1985] 2 All ER 1077 at 1083-1094 per Judge David Smout QC.

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## 762. Intention to create a trust.

In respect of a promise made by B to A for the benefit of C, the question whether A has created a trust of that promise so that C may enforce it as beneficiary is one of intention<sup>1</sup>. A may expressly evince an intention to create a trust<sup>2</sup>, in which case it is merely a question of construction whether C is the beneficiary of that promise<sup>3</sup>. Alternatively, A may create a trust by implication.

The question of whether a trust of a promise has been created by implication is one that has caused the courts some difficulty and sometimes given rise to apparently contradictory conclusions. Thus, a promise to a person to provide for his dependants on his retirement or death has been held to create a trust in some cases<sup>4</sup>, but not in others<sup>5</sup>; life assurance policies expressed to be for the benefit of third parties have been held to create a trust in some cases<sup>6</sup>, but not in others<sup>7</sup>; and in relation to other types of insurance the courts have similarly sometimes held that a third party could take advantage of the policy under such an implied trust<sup>8</sup>, and sometimes that he could not by reason of the doctrine of privity<sup>9</sup>.

It may be that there is no point in trying to reconcile all the cases cited above, as they may represent different stages in the development of the notion of a trust of a promise<sup>10</sup>. The modern tendency, it would seem, is to narrow the scope for the use of the trust for avoiding the doctrine of privity, and the courts today are markedly more reluctant to imply such a trust<sup>11</sup>. Among the factors which appear to influence the courts in deciding whether to imply a trust are the following:

- 82 (1) there must be an intention on the part of A that B's promise should benefit C<sup>12</sup>, not A<sup>13</sup>;
- 83 (2) that intention to benefit C must be irrevocable; a power in A to divert the benefit of the promise to himself is fatal<sup>14</sup>; but a mere power in A to redistribute the benefit between other third parties will not necessarily negative a trust, whether the alleged trust is created by contract<sup>15</sup> or statute<sup>16</sup>;
- 84 (3) such an irrevocable intention to benefit C is not necessarily conclusive in favour of a trust<sup>17</sup>, for it may merely show an intention to make a gift<sup>18</sup>; but it seems that an intention to create a trust of a promise will more readily be found where the promise by B to A was made in pursuance of some pre-existing contractual<sup>19</sup> or fiduciary<sup>20</sup> obligation owed by B to C.

1 *Swain v Law Society* [1983] 1 AC 598 at 620, [1982] 2 All ER 827 at 839, HL, per Lord Brightman. As to trusts of promises see para 761 ante; and for the equitable exceptions to the doctrine of privity generally see para 760 ante.

2 *Fletcher v Fletcher* (1844) 4 Hare 67; *Bowskill v Dawson* [1955] 1 QB 13, [1954] 2 All ER 649, CA.

3 See *Gandy v Gandy* (1885) 30 ChD 57, CA; and as to compliance with formal requirements imposed by the Law of Property Act 1925 s 53(1)(b) see EQUITY vol 16(2) (Reissue) paras 563-564, 851.

4 *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA. Cf *Page v Cox* (1852) 10 Hare 163; *Re Gordon, Lloyds Bank and Parratt v Lloyd and Gordon* [1940] Ch 851; *Drimmie v Davies* [1899] 1 IR 176.

5 *Re Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA (argument in favour of a trust by B's trustee in bankruptcy). Cf *Re Stapleton-Bretherton, Weld-Blundell v Stapleton-Bretherton* [1941] Ch 482, [1941] 3 All ER 5; *Re Greene, Greene v Greene* [1949] Ch 333, [1949] 1 All ER 167. In the following cases, it was conceded that



there was no trust: *Re Miller's Agreement, Uniacke v A-G* [1947] Ch 615, [1947] 2 All ER 78; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

6 *Re Richardson, Weston v Richardson* (1882) 47 LT 514; *Royal Exchange Assurance v Hope* [1928] Ch 179, CA; *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321; *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222.

7 *Re Burgess' Policy* (1915) 113 LT 443; *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348 (see para 764 note 5 post); *Re Clay's Policy of Assurance, Clay v Earnshaw* [1937] 2 All ER 548 (see para 764 note 5 post); *Re Foster, Hudson v Foster* [1938] 3 All ER 357; *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124.

*Re Engelbach's Estate* supra and *Re Sinclair's Life Policy* supra have been overruled on another ground: see para 749 note 18 ante.

8 *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E & B 870; *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282 (see para 764 note 13 post); *Prudential Staff Union v Hall* [1947] KB 685.

9 *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC; *Green v Russell* [1959] 2 QB 226, [1959] 2 All ER 525, CA.

10 *Hill v Gomme* (1839) 5 My & Cr 250; *Page v Cox* (1852) 10 Hare 163.

11 *Re Burgess' Policy* (1915) 113 LJ 43; *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124; *Re Schebsman* [1944] Ch 83 at 104, [1943] 2 All ER 768 at 704, CA.

12 See *Lys v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044.

13 *West v Houghton* (1879) 4 CPD 197, DC (criticised in *Re Flavell, Murray v Flavell* (1883) 25 ChD 89 at 98 per North J). The same may be true if it seems from the facts that A took the promise as much for the benefit of C as for his own benefit: *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC (one of the grounds for the decision was that, under the law of British Columbia, a father was liable for the torts of his minor children. Had this not been the case, the decision might have gone the other way; cf *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282).

14 *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124 (overruled on another ground: see para 749 note 18 ante). Even if there is no express power in A to divert the benefit to himself, the contract may so restrict the freedom of A and B as to make the court reluctant to find a trust was intended: *Re Burgess' Policy* (1915) 113 LT 443; *Re Schebsman* [1944] Ch 83, [1943] 2 All ER 768, CA. The earlier view was that a trust may arise although the contracting parties could divert the benefit away from C: see note 10 supra. But see *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222 (A's power to divert benefit time-limited and expired).

15 *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321. Cf *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222; *Re Garbett, Garbett v IRC* [1963] NZLR 384.

16 *Re Policy of the Equitable Life Assurance of the United States and Mitchell* (1911) 27 TLR 213; *Re Fleetwood's Policy* [1926] Ch 48; *Swain v Law Society* [1983] 1 AC 598 at 621, [1982] 2 All ER 827 at 840, HL, per Lord Brightman. As to trusts created by statute see paras 763-764 post.

17 *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348 (overruled on another point: see para 749 note 18 ante); *Re Clay's Policy of Assurance, Clay v Earnshaw* [1937] 2 All ER 548; *Re Foster, Hudson v Foster* [1938] 3 All ER 357; *Re Stapleton-Bretherton, Weld-Blundell v Stapleton-Bretherton* [1941] Ch 482, [1941] 3 All ER 5; *Green v Russell* [1959] 2 QB 226, [1959] 2 All ER 525, CA; *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898.

18 See *Richards v Delbridge* (1874) LR 18 Eq 11; *Swain v Law Society* [1983] 1 AC 598 at 620, [1982] 2 All ER 827 at 840, HL, per Lord Brightman; and GIFTS vol 52 (2009) PARA 269.

19 *Re Independent Air Travel Ltd* [1961] 1 Lloyd's Rep 604 (point conceded with approval of the court).

20 *Harmer v Armstrong* [1934] Ch 65, CA (fact that B was C's agent, and hence under a fiduciary duty, helped to establish the necessary intention). Cf *Pople v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743.

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### **C. BY STATUTE**

#### **763. The statutory exceptions.**

In addition to the real and apparent exceptions to the doctrine of privacy<sup>1</sup> allowed by the rules of common law<sup>2</sup> or of equity<sup>3</sup>, there are also some laid down by statute:

- 85 (1) a person may take an interest in land or other property or the benefit of any condition, covenant or agreement respecting land or other property, although not named as a party to the conveyance or other instrument<sup>4</sup>. On the basis that contractual rights are 'property', it has been suggested that this provision embodied a general exception to the privacy doctrine<sup>5</sup>; but this view now appears to have been rejected<sup>6</sup>;
- 86 (2) where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) includes the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty of care<sup>7</sup>. There are also specific provisions creating duties in respect of work in connection with a dwelling house which are owed, not only to the person ordering the work, but also to persons who later acquire an interest in the premises<sup>8</sup>;
- 87 (3) whilst any term or condition of a contract for the sale of goods by a supplier to a dealer, or of any agreement between them relating to such a sale, is generally void in so far as it purports to establish the minimum price to be charged on the resale of the goods<sup>9</sup>, it may be valid in so far as it specifies a maximum resale price<sup>10</sup>;
- 88 (4) the registered memorandum and articles of a company bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles<sup>11</sup>;
- 89 (5) if a bill of exchange is dishonoured, the drawer, acceptor and indorsers are all liable to compensate the holder in due course<sup>12</sup>;
- 90 (6) the court has a discretionary jurisdiction to grant a stay of proceedings in any cause or matter pending before it as might formerly have been restrained by injunction in equity at the suit of any party to that cause or matter<sup>13</sup>, or any third party<sup>14</sup>;
- 91 (7) there are a number of statutory exceptions in respect of different types of contract of insurance<sup>15</sup> and carriage by sea<sup>16</sup>.

The Law Commission has proposed that there should be a new general statutory exception to the privacy rule in respect of contracts between A and B under which B makes a promise in favour of C<sup>17</sup>.

1 As to the doctrine of privacy see paras 748-750 ante.

2 See paras 754-758 ante.

3 See paras 760-762 ante.

4 See the Law of Property Act 1925 s 56; and para 617 ante.

5 See para 617 head 94) ante.

6 See para 617 ante.

7 See the Occupiers' Liability Act 1957 s 3(1); and NEGLIGENCE vol 78 (2010) PARA 37.

8 See the Defective Premises Act 1972 s 1; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 77. Similarly, the landlord's duties under the Act to his tenant extend to third parties: see s 4.

9 See the Resale Prices Act 1976 ss 9, 10 (as amended). As to void contracts see generally para 836 et seq post.

10 See *ibid* s 26.

11 See the Companies Act 1985 s 14.

12 See the Bills of Exchange Act 1882 ss 54-56; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1515, 1574 et seq. But see *AEG (UK) Ltd v Lewis* [1993] 2 Bank LR 119, (1992) Times, 29 December, CA (third party paying A's debt by cheque not liable as been given no consideration).

13 See the Supreme Court Act 1981 s 49; and eg *Snelling v John G Snelling Ltd* [1973] QB 87, [1972] 1 All ER 79 (see also para 749 note 16 ante). See further CIVIL PROCEDURE.

14 See the Supreme Court Act 1981 s 49. But such third party can only obtain a stay where he can show that he might be placed under some legal liability if the case proceeded to judgment: *Gore v Van Der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA (see also paras 814 note 7, 830 note 4 post); *Nippon Yusen Kaisha v International Import and Export Co Ltd, The Elbe Maru* [1978] 1 Lloyd's Rep 206. See generally CIVIL PROCEDURE.

15 See para 764 post; and INSURANCE.

16 See the Carriage of Goods by Sea Act 1971 s 1(2), Schedule art IV; and CARRIAGE AND CARRIERS.

17 See *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) (Law Com no 242; Cm 3329). This new exception would not impose the burden of a contract on one not a party to it (C), but would allow him to take the benefit of it. Without detracting from the present exceptions, this new statutory one would allow C the usual rights of enforcement where he is either named in the contract or it purports to confer a benefit on him, upon which A and B would lose the right to vary or cancel the contract. *Prima facie*, C's proposed new statutory rights should be subject to all the defences and set-offs that B would have had against A. Further, under these proposed rules, C could rely on an exclusion or limitation clause in the contract; and B's duty should be owed to A and C, though without double jeopardy: see *Privity of Contract: Contracts for the Benefit of Third Parties* *supra* and the draft Contracts (Rights of Third Parties) Bill contained therein.

## UPDATE

### 763 The statutory exceptions

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 8--1972 Act s 4 modified: Commonhold and Leasehold Reform Act 2002 Sch 7 para 2 (in force in relation to England: SI 2003/1986).

NOTES 9, 10--Resale Prices Act 1976 repealed: Competition Act 1998 Sch 14 Pt I.

NOTE 11--Companies Act 1985 s 14 replaced by Companies Act 2006 s 33: see COMPANIES vol 14 (2009) PARA 243 et seq

NOTES 13, 14--Supreme Court Act 1981 now cited as Senior Courts Act 1981:  
Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### **763A. Rights of third parties.**

The following provisions do not apply in relation to a contract entered into before 11 May 2000, unless the contract is entered into on or after 11 November 1999 and expressly provides for the application of the Contracts (Rights of Third Parties) Act 1999: s 10(2), (3).

#### **1. Right of third party to enforce contractual term**

A person who is not a party to a contract may in his own right enforce a term of the contract if the contract expressly provides that he may<sup>1</sup>, or the term purports to confer a benefit on him<sup>2</sup>. The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into<sup>3</sup>. A third party has no right to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract<sup>4</sup>. For the purpose of exercising his right to enforce a term of the contract, there is available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract, and the rules relating to damages, injunctions, specific performance and other relief apply accordingly<sup>5</sup>. Nothing in the above provisions affects any right of the promisee<sup>6</sup> to enforce any term of the contract<sup>7</sup>. Similarly, the above provisions do not affect any other right or remedy of the third party that exists or is available<sup>8</sup>.

1 Contracts (Rights of Third Parties) Act 1999 s 1(1)(a).

2 Ibid s 1(1)(b). This does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party: s 1(2). See *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 All ER (Comm) 481; *Laemthong International Lines Co Ltd v Artis* [2005] EWCA Civ 519, [2005] 2 All ER (Comm) 167 (defendant failed to discharge burden of showing that letter of indemnity not intended to be enforceable by third party). See also *Prudential Assurance Co Ltd v Ayres* [2008] EWCA Civ 52, [2008] 1 All ER 1266; *Dolphin Maritime & Aviation Services Ltd v Sveriges Angartygs Assurans Forening* [2009] EWHC 716 (Comm), [2010] 1 All ER (Comm) 473.

3 1999 Act s 1(3). See *Avraamides v Colwill* [2006] EWCA Civ 1533, [2006] All ER (D) 167 (Nov) (agreement did not identify any third party or class of third parties).

4 1999 Act s 1(4). Where a term of a contract excludes or limits liability in relation to any matter references in the 1999 Act to the third party enforcing the term are to be construed as references to his availing himself of the exclusion or limitation: s 1(6).

5 Ibid s 1(5). A party must not be treated, by virtue of s 1(5), as a party to the contract for the purposes of any other Act (or any instrument made under any other Act): s 7(4).

6 'Promisee' means the party to the contract by whom the term is enforceable against the promisor: s 1(7).

7 Ibid s 4.

8 Ibid s 7(1).

#### **2. Variation and rescission of contract**

Where a third party has a right to enforce a term of the contract<sup>1</sup>, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter

his entitlement under that right, without his consent if (1) the third party has communicated his assent to the term to the promisor<sup>2</sup>; (2) the promisor is aware that the third party has relied on the term<sup>3</sup>; or (3) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it<sup>4</sup>. However, this restriction is subject to any express term of the contract under which (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party<sup>5</sup>; or (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in heads (1)-(3) above<sup>6</sup>. Where the consent of a third party is required<sup>7</sup>, the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied<sup>8</sup> that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained<sup>9</sup>, or that he is mentally incapable of giving his consent<sup>10</sup>. The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under head (3) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term<sup>11</sup>. If the court or arbitral tribunal dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party<sup>12</sup>. The jurisdiction conferred on the court<sup>13</sup> by sub-ss (4) to (6) is exercisable by both the High Court and a county court<sup>14</sup>.

1    Ie under the Contracts (Rights of Third Parties) Act 1999 s 1: see PARA 763A.1.

2    Ibid s 2(1)(a). 'Promisor' means the party to the contract against whom the term is enforceable by the third party: s 1(7). The assent may be by words or conduct, and if sent to the promisor by post or other means must not be regarded as communicated to the promisor until received by him: s 2(2).

3    Ibid s 2(1)(b).

4    Ibid s 2(1)(c).

5    Ibid s 2(3)(a).

6    Ibid s 2(3)(b).

7    Ie under s 2(1), (3).

8    Ibid s 2(4).

9    Ibid s 2(4)(a).

10   Ibid s 2(4)(b).

11   Ibid s 2(5).

12   Ibid s 2(6).

13   Ie under ibid s 2(4)-(6).

14   Ibid s 2(7).

### **3. Defences available to promisor**

Where proceedings for the enforcement of a term of a contract are brought by a third party<sup>1</sup>, the promisor has available to him by way of defence or set-off any matter that (1) arises from or in connection with the contract and is relevant to the term<sup>2</sup>; and (2) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee<sup>3</sup>. The promisor also has available to him by way of defence or set-off any matter if (a) an express term of the contract provides for it to be available to him in proceedings brought by the third party; and (b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee<sup>4</sup>. Further, the promisor also has available to him by way of defence or set-off any matter, and by way of counterclaim any matter not arising

from the contract, that would have been available to him by way of defence, set-off or counterclaim against the third party if the third party had been a party to the contract<sup>5</sup>. Where in any proceedings brought against him a third party seeks to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract<sup>6</sup>.

Where a term of a contract is enforceable by a third party<sup>7</sup>, and the promisee has recovered from the promisor a sum in respect of the third party's loss in respect of the term or the expense to the promisee of making good to the third party the default of the promisor, then, in any proceedings brought by the third party, the court or arbitral tribunal must reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee<sup>8</sup>.

1 Contracts (Rights of Third Parties) Act 1999 s 3(1). The proceedings are brought in reliance on s 1: see PARA 763A.1.

2 Ibid s 3(2)(a). Section 3(2) is subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim: s 3(5). For the meaning of 'promisor' see PARA 763A.2 NOTE 2.

3 Ibid s 3(2)(b). For the meaning of 'promisee' see PARA 763A.1 NOTE 6.

4 Ibid s 3(3).

5 Ibid s 3(4). Section 3(4) is subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim: s 3(5). A third party must not, by virtue of s 3(4) or (6) (see NOTE 6), be treated as a party to the contract for the purposes of any other Act (or any instrument made under any other Act): s 7(4).

6 Ibid s 3(6).

7 Ie under ibid s 1: see PARA 763A.1.

8 Ibid s 5.

#### 4. Exceptions

No rights are conferred<sup>1</sup> on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument<sup>2</sup>. Similarly, no rights are conferred on a third party in the case of any contract binding on a company and its members under the statutory provision relating to the memorandum and articles<sup>3</sup>. No rights are conferred on a third party to enforce: (1) any term of a contract of employment against an employee<sup>4</sup>; (2) any term of a worker's contract against a worker (including a home worker)<sup>5</sup>; or (3) any term of a relevant contract against an agency worker<sup>6</sup>.

No rights are conferred on a third party in the case of (a) a contract for the carriage of goods by sea<sup>7</sup>; or (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention<sup>8</sup>. However, a third party may avail himself of an exclusion or limitation of liability in such a contract<sup>9</sup>.

1 Ie under the Contracts (Rights of Third Parties) Act 1999 s 1: see PARA 763A.1.

2 Ibid s 6(1).

3 Ibid s 6(2) (amended by SI 2009/1941). The statutory provision referred to is the Companies Act 2006 s 33: see COMPANIES vol 14 (2009) PARA 243.

4 1999 Act s 6(3)(a). 'Contract of employment' and 'employee' have the meaning given by the National Minimum Wage Act 1998 s 54 (see EMPLOYMENT vol 39 (2009) PARAS 2, 158); 1999 Act s 6(4)(a).

5 Ibid s 6(3)(b). 'Worker's contract' and 'worker' have the meaning given by the National Minimum Wage Act 1998 s 54, and 'home worker' has the meaning given by s 35(2) (see EMPLOYMENT vol 39 (2009) PARA 163); 1999 Act s 6(4)(a), (b).

6 Ibid s 6(3)(c). 'Agency worker' has the meaning given by the National Minimum Wage Act 1998 s 34(1) (see EMPLOYMENT vol 39 (2009) PARA 162); 1999 Act s 6(4)(c). 'Relevant contract' means a contract entered into, in a case where the 1998 Act s 34 applies, by the agency worker as respects work falling within s 34(1)(a): 1999 Act s 6(4)(d).

7 Ibid s 6(5)(a). 'Contract for the carriage of goods by sea' means a contract of carriage (1) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction; or (2) under, or for the purposes of which, there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction: s 6(6). 'Bill of lading', 'sea waybill' and 'ship's delivery order' have the same meaning as in the Carriage of Goods by Sea Act 1924 (see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 338, 364, 365) and a corresponding electronic transaction is a transaction within the 1992 Act s 1(5) (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 337) which corresponds to the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship's delivery order: 1999 Act s 6(7).

8 Ibid s 5(6)(b). 'The appropriate international transport convention' means (1) in relation to a contract for the carriage of goods by rail, the Convention which has the force of law in the United Kingdom under the Railways (Convention on International Carriage by Rail) Regulations 2005, SI 2005/2092, reg 3 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 683); (2) in relation to a contract for the carriage of goods by road, the Convention which has the force of law in the United Kingdom under the Carriage of Goods by Road Act 1965 s 1 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 650); and (3) in relation to a contract for the carriage of cargo by air (a) the Convention which has the force of law in the United Kingdom under the Carriage by Air Act 1961 s 1 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 121); or (b) the Convention which has the force of law under the Carriage by Air (Supplementary Provisions) Act 1962 s 1 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 121); or (c) either of the amended Conventions set out in the Carriage by Air Acts (Application of Provisions) Order 1967 Sch 2 Pt B or Sch 3 Pt B (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 121): 1999 Act s 6(8).

9 Ibid s 6(5).

## 5. Arbitration

Where (1) a third party's right to enforce a term<sup>1</sup> ('the substantive term') is subject to a term providing for the submission of disputes to arbitration<sup>2</sup>; and (2) that agreement is an agreement in writing for the purposes of legislation relating to arbitration<sup>3</sup>, the third party is to be treated for the purposes of that legislation as a party to the arbitration agreement as regards disputes between himself and the promisor<sup>4</sup> relating to the enforcement of the substantive term by the third party<sup>5</sup>.

Where (a) a third party has a right to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration<sup>6</sup>; (b) that agreement is an agreement in writing for the purposes of legislation relating to arbitration<sup>7</sup>; and (c) the third party does not fall to be treated under heads (1) and (2) above as a party to that agreement<sup>8</sup>, the third party must, if he exercises the right, be treated for the purposes of that legislation as a party to that agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right<sup>9</sup>.

1 Ie under the Contracts (Rights of Third Parties) Act 1999 s 1: see PARA 763A.1.

2 Ibid s 8(1)(a).

3 Ibid s 8(1)(b). The legislation referred to is the Arbitration Act 1996 Pt 1 (ss 1-84).

4 For the meaning of 'promisor' see PARA 763A.2 NOTE 2.

5 1999 Act s 8(1). See *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38.



- 6 1999 Act s 8(2)(a).
- 7 Ibid s 8(2)(b). The legislation referred to is the Arbitration Act 1996 Pt 1 (ss 1-84).
- 8 1999 Act s 8(2)(c).
- 9 Ibid s 8(2).

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## 764. Insurance.

Whilst the doctrine of privity applies to contracts of insurance<sup>1</sup>, its effects in relation to these contracts has been modified, not only by the doctrine of agency<sup>2</sup> and by certain trusts<sup>3</sup>, but also by a number of statutory exceptions.

With regard to fire insurance, where an insured house or building is destroyed by fire, the insurer may generally be required by any person interested in that house or building to lay out the insurance moneys towards its reinstatement<sup>4</sup>.

With regard to life insurance, a policy of insurance effected by one spouse on his or her own life<sup>5</sup> and expressed to be for the benefit of his or her spouse and/or children<sup>6</sup> creates a statutory trust<sup>7</sup> in favour of the objects named in the policy<sup>8</sup>.

With regard to insurance by persons with limited interests, where a person with a limited interest in property insures it for its full value, the common law rule is that the insurance inures for the benefit of all persons interested in the property; the person effecting it is regarded as effecting it as agent on their behalf<sup>9</sup>. He may recover the full value from the insurers; but he is regarded as trustee of any such sums recovered as exceed his loss<sup>10</sup>, and is liable to pay those sums to the other persons interested in the property<sup>11</sup>. Several real or supposed common law exceptions to this principle have been removed by statute<sup>12</sup>.

Motor insurance provides exceptions with regard to two classes of person, a third party driver and an injured third party, as follows:

- 92 (1) without having to prove that the owner of a vehicle intended to constitute himself a trustee of his insurance for that driver<sup>13</sup>, a third party driving a vehicle with the consent of the owner can take the benefit of any provision in his favour in the owner's insurance policy<sup>14</sup>;
- 93 (2) where there is a provision insuring against liability to a third party, an injured third party falling within the terms of that provision may in certain circumstances take proceedings directly against the insurer<sup>15</sup>; and, where there is no such protection available to the injured third party, he may have recourse against the Motor Insurers' Bureau<sup>16</sup>.

1 See *Boston Fruit Co v British and Foreign Marine Insurance Co* [1906] AC 336, HL; *Yangtze Insurance Association v Lukmanjee* [1918] AC 585, PC; *Normid Housing Association Ltd v Ralphs and Mansell and Assicurazioni Generali SpA* [1989] 1 Lloyd's Rep 274, CA.

2 See para 755 ante.

3 See para 761 ante.

4 See the Fires Prevention (Metropolis) Act 1774; and INSURANCE. Thus, a tenant may claim under his landlord's insurance (*Portavon Cinema Co Ltd v Price and Century Insurance Co Ltd* [1939] 4 All ER 601) and vice versa. Cf the position of a devisee: see *Re Rushbrook's Will Trusts, Allwood v Norwich Diocesan Fund and Board of Finance* [1948] Ch 421, [1948] 1 All ER 932; and EXECUTORS AND ADMINISTRATORS.

5 This provision only applies where a person insures his own life, and not that of his child: *Re Engelbach's Estate, Tibbetts v Englebach* [1924] 2 Ch 348 (overruled on another ground: see para 749 note 18 ante). It does not apply to dependants other than the spouse and children of the marriage: *Re Clay's Policy of Assurance, Clay v Earnshaw* [1937] 2 All ER 548 (informally adopted child). See also para 762 note 7 ante.

6 Including illegitimate children: see the Family Law Reform Act 1969 s 19(1).

7 In a case falling outside the statutory trust, it is possible to create an express or implied trust: *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222; and see para 761 ante.

8 See the Married Women's Property Act 1882 s 11 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 274. For an exceptional case where the promisee's executors were held entitled to the benefit of the policy moneys see *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA. See also para 761 note 4 ante.

9 See paras 754-755 ante.

10 See para 761 ante.

11 *Waters v Monarch Fire and Life Insurance Co* (1856) 5 E & B 870; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; and see INSURANCE.

12 See the Marine Insurance Act 1906 s 14(2); the Law of Property Act 1925 s 47; and INSURANCE; SALE OF LAND.

13 In *Williams v Baltic Insurance Association of London Ltd* [1924] 2 KB 282 an owner was found to be a trustee of the benefit of his insurance policy for a third party driving with his consent. For intention to create a trust see para 762 note 8 ante.

14 See the Road Traffic Act 1988 s 148(7); and INSURANCE vol 25 (2003 Reissue) paras 708, 721, 738; ROAD TRAFFIC vol 40(2) (2007 Reissue) para 948.

15 See the Third Parties (Rights against Insurers) Act 1930 s 1 (as amended); the Road Traffic Act 1988 ss 151-153 (amended by the Road Traffic Act 1991 ss 48, 83, Sch 4 para 66, Sch 8); and INSURANCE vol 25 (2003 Reissue) para 750; ROAD TRAFFIC vol 40(2) (2007 Reissue) paras 951-953. For the rights of such persons where the insurance company is in liquidation see the Policyholders Protection Act 1975 s 7 (as amended); and INSURANCE vol 25 (2003 Reissue) para 156; ROAD TRAFFIC.

16 By agreement between the Motor Insurers' Bureau and the Secretary of State for the Environment, Transport and the Regions, the Bureau promises to pay any unsatisfied judgment in respect of the compulsory motor insurance against injury to third parties. That agreement is specifically enforceable by the minister (*Gurtner v Circuit* [1968] 2 QB 587, [1968] 1 All ER 328, CA) and the Bureau has never repudiated an action by an injured third party on grounds of lack of privity: *Gurtner v Circuit* supra at 599 and at 334 per Diplock LJ. Whilst the foundations of the agreement 'are better not questioned' (*Gardner v Moore* [1984] AC 548 at 556, [1984] 1 All ER 1100 at 1102, HL, per Lord Hailsham of St Marylebone LC), Bureau policy is not to rely on the doctrine of privity as against the injured third party (*Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA; *Randall v Motor Insurers' Bureau* [1969] 1 All ER 21, [1968] 1 WLR 1900; *Perrson v London Country Buses* [1974] 1 All ER 1251, [1974] 1 WLR 569, CA; *Porter v Addo* [1978] RTR 503). See generally INSURANCE; ROAD TRAFFIC.

## UPDATE

### 764 Insurance

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 15--Policyholders Protection Act 1975 repealed: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVITY/(3) CONTRACTS WITH UNINCORPORATED ASSOCIATIONS/765. Clubs, charitable institutions etc.

### (3) CONTRACTS WITH UNINCORPORATED ASSOCIATIONS

#### 765. Clubs, charitable institutions etc.

There are many kinds of voluntary associations, which, being unincorporated, have no legal entity at common law<sup>1</sup>. Examples of such associations are unincorporated members' clubs<sup>2</sup>, unincorporated charitable institutions<sup>3</sup>, voluntary associations for the purpose of carrying out temporary functions of a social character<sup>4</sup> and trade unions<sup>5</sup>. Associations of this kind can neither sue nor be sued on contracts made in their name or on their behalf<sup>6</sup>, nor can they authorise an officer to sue or be sued on their behalf on such contracts, even if their rules purport to give them power to do so<sup>7</sup>, except where the power has been expressly conferred by Act of Parliament<sup>8</sup>.

Where work has been done for, or goods have been supplied to, such an association and there is no statutory provision to the contrary, the question of liability is governed by the rules which apply to contracts made through an agent<sup>9</sup>. The only persons who can be made liable are those who actually gave the order for the work or the goods, or who either expressly or impliedly authorised the giving of the order on their behalf, or who ratified the order after it had been given<sup>10</sup>. In the case of a voluntary association for temporary purposes, a distinction is to be drawn as regards the inference of authority between the members of a provisional committee who merely lend the sanction of their names to the project, and members of an acting committee who are appointed for the purpose of carrying the scheme into effect<sup>11</sup>.

1 As to contracts with incorporated bodies see para 630 notes 8-9 ante.

2 See CLUBS vol 13 (2009) PARA 266 et seq.

3 See CHARITIES vol 8 (2010) PARA 611.

4 *Pilot v Craze* (1888) 52 JP 311 (stewards of jubilee fete); *Lord Hill v Earl of Lathom* (1894) 10 TLR 301 (executive council of Irish Exhibition in London). See also *Carrick's Case* (1851) 1 Sim NS 505 at 509 (persons engaged in an attempt to form a limited company).

5 *Bonsor v Musicians' Union* [1956] AC 104, [1955] 3 All ER 518, HL; but see note 8 infra.

6 As to the rights and duties inter se of the members of a club see CLUBS vol 13 (2009) PARA 230 et seq.

7 *Gray v Pearson* (1870) LR 5 CP 568; *Evans v Hooper* (1875) 1 QBD 45, CA; and see CLUBS vol 13 (2009) PARA 279 et seq.

8 Eg friendly societies (see the Friendly Societies Act 1974 s 103; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2381); trade unions and employers' associations (see EMPLOYMENT vol 40 (2009) PARAS 852, 1029).

9 *Bradley Egg Farm Ltd v Clifford* [1943] 2 All ER 378, CA (executive committee of unincorporated society liable for negligent performance of contract by servant). As to representation orders see RSC Ord 15 r 12; and as to contracts made by an agent on behalf of his principal see para 755 ante; and AGENCY vol 1 (2008) PARAS 77 et seq, 156 et seq.

10 *Longman v Lord Hill* (1891) 7 TLR 639; *Braithwaite v Skofield* (1829) 9 B & C 401 (resolution of unincorporated building society to have work done; member who joined in resolution liable); *Bradley Egg Farm Ltd v Clifford* [1943] 2 All ER 378, CA. As to the application of this principle in relation to clubs see CLUBS vol 13 (2009) PARA 266 et seq; and as to its application in relation to voluntary associations for temporary purposes see the cases cited in note 4 supra.

Further illustrations of the principle are to be found in contracts made with volunteer corps before their merger into the Territorial Army. The only way in which a binding contract could be made on behalf of such a body was by somebody pledging his personal liability on its behalf: see *Jones v Hope* (1880) 3 TLR 247, CA; *Cross v Williams* (1862) 7 H & N 675; *Hebbert & Co v Silver* (1892) 8 TLR 234; *Samuel Bros v Whetherly* [1907] 1 KB 709; affd [1908] 1 KB 184, CA. As to the situation where credit is given to a particular fund see para 766 post.

11 *Reynell v Lewis, Wyld v Hopkins* (1846) 15 M & W 517; *Burnside v Dayrell* (1849) 3 Exch 224; *Maddick v Marshall* (1864) 17 CBNS 829, Ex Ch; *Bright v Hutton* (1852) 3 HL Cas 341; *Re Wolverhampton, Chester and Birkenhead Junction Rly Co, Norris v Cottle* (1850) 2 HL Cas 647; *Hutton v Thompson* (1851) 3 HL Cas 161 at 192; *Bailey v Macaulay* (1849) 13 QB 815; *Lake v Duke of Argyll* (1844) 6 QB 477; *Pilot v Craze* (1888) 52 JP 311. As to the liability of promoters of companies on contracts made in the course of promotion see COMPANIES vol 14 (2009) PARA 66 et seq.

## UPDATE

### 765 Clubs, charitable institutions etc

NOTE 9--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/4. CONSIDERATION AND PRIVITY/(3) CONTRACTS WITH UNINCORPORATED ASSOCIATIONS/766. Credit given to particular fund.

**766. Credit given to particular fund.**

In any of the cases concerned with voluntary associations considered in the previous paragraph<sup>1</sup>, if the creditor looks for payment not to any of the members of the association, but to a particular fund, he can have recourse only to that fund and cannot make the members liable on the contract<sup>2</sup>.

<sup>1</sup> See para 765 ante.

<sup>2</sup> Thus, the minister of a Baptist church who was appointed by the deacons of the church at a weekly salary could not make the deacons liable for payment of his salary where he looked for payment to a fund subscribed by the members of the congregation and there was nothing to indicate that the deacons undertook to be personally liable for the payment: *Morley v Makin* (1905) 54 WR 395; cf *Coutts & Co v Irish Exhibition in London* (1891) 7 TLR 313, CA; *Scott v Lord Ebury* (1867) LR 2 CP 255.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(i) In general/767. Representations.

## 5. CONTRACTUAL TERMS

### (1) REPRESENTATIONS AND TERMS

#### (i) In general

##### 767. Representations.

During the course of the formation of a contract<sup>1</sup>, one of the persons who are to become parties to the contract may make representations to another such person. A representation is a statement made by one party (the representor) to another party (the representee) which relates, by way of affirmation, denial, description or otherwise, to a matter of fact or present intention. If untrue, it may be termed a misrepresentation.

A representation of fact may or may not be intended to have contractual force; if it is so intended, it will also amount to a contractual term<sup>2</sup>; if it is not so intended, a positive statement<sup>3</sup> is termed a mere representation<sup>4</sup>. The possible legal effects of a mere representation are considered elsewhere in this work<sup>5</sup>.

Except where a representation of intention amounts to a representation of fact<sup>6</sup>, it can normally have no effect on a contract between the representor and representee unless it amounts to a contractual promise<sup>7</sup>. Exceptionally, however, a representation of intention may have an effect on the contract, notwithstanding that it does not amount to a contractual promise, by reason of the doctrines of waiver<sup>8</sup> and equitable estoppel<sup>9</sup>.

A misrepresentation may sometimes amount to a tort: if it is made fraudulently, the tort of deceit may be committed<sup>10</sup>; whereas, if it is made carelessly, there may be the tort of negligent misstatement<sup>11</sup>. Moreover, the scope of (tortious) negligent misstatements may overlap with the category in the law of contract of carelessly made (negligent) misrepresentations<sup>12</sup>; but these two categories must be kept separate because of their different incidents<sup>13</sup>.

1 As to formation of a contract see para 629 et seq ante.

2 See para 769 post.

3 Except in the case of special classes of contracts (see para 701 note 8 ante), mere non-disclosure does not, prima facie, amount to a misrepresentation: see para 708 note 14 ante; and MISREPRESENTATION AND FRAUD. Compare the principle of good faith dealings: see para 613 ante.

4 As to the distinction between contractual terms and mere representations see para 768 post.

5 See MISREPRESENTATION AND FRAUD.

6 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 705 et seq.

7 As to contractual promises see para 769 post.

8 See paras 1025-1028 post.

9 See paras 1030-1035 post.

10 *Derry v Peek*(1889) 14 App Cas 337, HL; and see MISREPRESENTATION AND FRAUD; TORT.

11 *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[1964] AC 465, [1963] 2 All ER 575, HL; and see paras 610, 759 ante.

12 See the Misrepresentation Act 1967 s 2(1); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 801.

13 See *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd*[1978] QB 574, [1978] 2 All ER 1134, CA.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(i) In general/768. Distinction between contractual terms and mere representations.

### **768. Distinction between contractual terms and mere representations.**

The legal effect of a contractual term<sup>1</sup> differs from that of a mere representation<sup>2</sup>; accordingly, it is necessary to determine into which of these two categories fall statements made by the parties during negotiations leading to a binding contract<sup>3</sup>. Basically, the problem is one of determining the intention of the parties as evidenced by their words<sup>4</sup> and conduct<sup>5</sup>, so that no general principle of interpretation can be universally true<sup>6</sup>. Because, however, the intention of the parties seldom clearly appears, the courts have had regard to any one or more of a number of factors for attributing an intention. These factors should be regarded as valuable, though not decisive<sup>7</sup>, tests.

The factors taken into account by the courts are as follows:

- 94 (1) if only a brief period of time elapses between the making of the statement and the formation of the contract, the court may be disposed to hold that the statement is a term of the contract<sup>8</sup>;
- 95 (2) where the party to whom the statement is made makes it clear that he regards the matter as so important that he would not contract without the assurance being given, that is evidence of an intention of the parties that the statement is to be a term of the contract<sup>9</sup>;
- 96 (3) where the party making the statement is stating a fact which is or should be within his own knowledge and of which the other party is ignorant, that is evidence that the statement is intended to be a term of the contract<sup>10</sup>;
- 97 (4) where, subsequent to negotiations, the parties enter into a written contract and that contract does not contain the statement in question, that may point towards the statement being a mere representation<sup>11</sup>, though there have been cases where it has been found that such a preliminary statement constitutes a collateral contract<sup>12</sup>;
- 98 (5) where the party making the statement suggests that the listener takes an independent survey or opinion, that may show that no warranty was intended<sup>13</sup>;
- 99 (6) it has been said that the maker of a statement can rebut an inference of warranty if he can show that he was innocent of fault in making it, and that it would not be reasonable in the circumstances to hold him bound by it<sup>14</sup>.

Contractual terms must also be distinguished from words of expectation or estimate, which do not form part of the contract<sup>15</sup>; such statements may not even give rise to liability as misrepresentations if they are honestly made<sup>16</sup>.

Finally, in modern times a pre-contractual statement may amount to both a misrepresentation and a contractual term<sup>17</sup>; and it may therefore be necessary to consider the position on both alternatives<sup>18</sup>. To the extent that there is now a statutory right of action for certain misrepresentations, this may render it less pressing to prove that a misrepresentation amounts to a contractual promise<sup>19</sup>.

1 The different types of contractual term are considered in paras 993-996 post.

2 See para 767 ante. The major differences are: (1) the nature of rescission for breach of a term differs from that of rescission for misrepresentation (see para 986 post); (2) liability in damages for breach of a contractual term will often arise without the necessity for any fault, whereas, except in the limited circumstances provided

for in the Misrepresentation Act 1967 s 2(2) (see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 834), there is no liability in damages for a purely innocent misrepresentation. 'Representation' and 'warranty' have different meanings in the law of insurance: see the Marine Insurance Act 1906 ss 20, 33-41; and INSURANCE.

3 A statement in an advertisement is capable of being a term in a subsequent contract: *Beale v Taylor* [1967] 3 All ER 253, [1967] 1 WLR 1193, CA (advertisement of car for private sale); *Turner v Anquetil* [1953] NZLR 952, NZ SC (advertisement of piano for private sale); and see *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA. However, a statement is capable of being a mere representation even if it is in a written document used at the time of the formation of the contract: see *Eaglesfield v Marquis of Londonderry* (1875) 4 ChD 693, CA (incorrect statement in share transfer certificate).

4 *Liverpool and County Discount Co Ltd v AB Motor Co (Kilburn) Ltd* [1963] 2 All ER 396, [1963] 1 WLR 611, CA ('we hereby certify and warrant').

5 'An affirmation at the time of a sale is a warranty, provided it appears on evidence to have been so intended': attributed to Holt CJ by Buller J in *Pasley v Freeman* (1789) 3 Term Rep 51 at 57; *Heilbut, Symons & Co v Buckleton* [1913] AC 30, HL; *Marston Excelsior Ltd v Arbuckle Smith & Co Ltd* [1971] 1 Lloyd's Rep 70; revsd on another point [1971] 2 Lloyd's Rep 306, CA. A party's actual intention may be overridden by the objective inference drawn from his behaviour at the time of the transaction: *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 257, [1956] 3 All ER 970 at 972, CA, per Denning LJ.

6 *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 50, HL, per Lord Moulton.

7 See note 6 supra.

8 *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103, CA (statement made same day as sale held to be a warranty); *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA (statement immediately before sale held to be warranty); *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615, CA (seven days between statement and sale; no warranty). But cf *Schawel v Reade* [1913] 2 IR 81, HL (where it was held that there was a warranty though the sale was three weeks after statement: 'It would be impossible to my mind, to have a clearer example of an express warranty where the word 'warranty' was not used', per Lord Moulton); *Hopkins v Tanqueray* (1854) 15 CB 130 (no warranty though sale one day after statement). An important factor in *Schawel v Reade* supra may be that the statement terminated an examination of the horse that the buyer was making. In *Hopkins v Tanqueray* supra the horse was sold at Tattersalls auction, where there was a custom that horses were not warranted unless so described in the catalogue; but cf *Couchman v Hill* supra (oral, private offer of warranty overriding conditions of sale which excluded warranties, etc; for doubts as to the legality of such a warranty see *Hopkins v Tanqueray* supra at 142 per Crowder J).

9 *Bannerman v White* (1861) 10 CBNS 844 (sale of hops, purchaser making it clear that he would not buy if they contained sulphur, which vendor assured him they did not); *Thornalley v Gostelow* (1947) 80 Ll L Rep 507 (sale of boat for fishing; purpose made known to vendor). In *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, CA (sale of 1939 car as 1948 model) the purchasers would have bought had they known the truth, but at a lower price.

10 *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 at 329, 331, [1957] 1 WLR 370 at 375, 378, CA, per Denning and Hodson LJ respectively (private sale of car to garage); *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65 at 67, [1965] 1 WLR 623 at 628, CA, per Lord Denning MR; see also *Stucley v Baily* (1862) 1 H & C 405 at 420 per Bramwell B; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All 5, CA (tenancy agreement of petrol filling station entered into on the basis of a misstatement by oil company landlord as to potential throughput; warranty); *Thake v Maurice* [1986] QB 644, [1986] 1 All ER 497, CA (vasectomy; no warranty that patient would be rendered absolutely sterile); *Eyre v Measday* [1986] 1 All ER 488, CA (female sterilisation; no warranty). Cf *Maybury v Wibrew* (1949) 82 Ll L Rep 481 (purchaser of horse obviously relying on his own inspection); *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564, [1990] 1 All ER 737, CA (general art dealer seller attributed painting when selling to specialist; held no warranty).

11 In *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615, CA, and *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493, this was in fact the case, though it is not any part of the expressed ratio of the cases; *Hill v Harris* [1965] 2 QB 601 at 616, [1965] 2 All ER 358 at 362, CA, obiter per Diplock LJ (allegation of warranty collateral to lease). Cf *De Lassalle v Guildford* [1901] 2 KB 215, CA; *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113; *Birch v Paramount Estates Ltd* (1956) 167 Estates Gazette 396 (warranties found though not incorporated into subsequent written contracts). Where, by reason of a mistake common to both parties, a written contract does not represent their previous oral understanding, rectification of the written contract may be ordered: see *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; para 896 post; and MISTAKE vol 77 (2010) PARA 57 et seq.

12 As to collateral contracts in general see *De Lassalle v Guildford* [1901] 2 KB 215, CA; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733 (collateral contracts and parol

evidence rule: see para 753 note 15 ante); *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA; *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA; *Independent Broadcasting Authority v BICC Construction Ltd* (1980) 130 NLJ 603, HL; and DEEDS AND OTHER INSTRUMENTS. As to collateral contracts in the context of privity see para 753 ante.

13 *Van Raalte v Fitzroy* (1956) Times, 10 March (sale of horse; vendor insisting on examination by vet); *Ecay v Godfrey* (1947) 80 Ll L Rep 286 (sale of boat; vendor suggesting survey).

14 *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65 at 67, [1965] 1 WLR 623 at 627-628, CA, per Lord Denning MR. It is difficult to reconcile this view with the distinction drawn by the Misrepresentation Act 1967 s 2 between negligent and purely innocent misrepresentations: see further MISREPRESENTATION AND FRAUD.

15 See *Barker v Windle* (1856) 6 E & B 675 (statement of tonnage in charterparty); *McConnel v Murphy* (1873) LR 5 PC 203 ('about 600 red pine spars'); *McLay & Co v Perry & Co* (1881) 44 LT 152 ('about 150 tons').

16 See *Bisset v Wilkinson* [1927] AC 177, PC; and MISREPRESENTATION AND FRAUD.

17 See eg *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All 5, CA.

18 Eg for the purposes of dealing with exclusion clauses: see para 819 et seq post.

19 See the Misrepresentation Act 1967 s 2(1); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 801.

## UPDATE

### 768 Distinction between contractual terms and mere representations

NOTE 12--See also *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622, [2007] 32 EG 90. For related proceedings as to costs, see *Business Environment Bow Lane v Deanwater Estates Ltd* [2008] EWHC 2003 (TCC), [2008] All ER (D) 78 (Oct); and CIVIL PROCEDURE vol 12 (2009) PARA 1739.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(i) In general/769. Contractual terms.

### **769. Contractual terms.**

The terms of a contract may be express<sup>1</sup> or implied<sup>2</sup>; and separate consideration is given below to one particular type of contractual term, namely exclusion clauses<sup>3</sup>.

Where a contractual term has been broken, it will, apart from the possible effect of any exclusion clause, probably give rise to a claim for damages for breach of the relevant contract<sup>4</sup>, or of any collateral contract<sup>5</sup>. Prima facie, the promisor will be strictly liable in the law of contract for failure to perform that which he promised to perform<sup>6</sup>, unless his promise is impossible to perform<sup>7</sup>; and this situation may be contrasted with an action in tort in respect of a broken promise, which will depend on the promisor's state of mind<sup>8</sup>. Furthermore, the breach may in some cases give the promisee the additional right to rescind the relevant contract<sup>9</sup>.

Where the contract is one of consumer supply, there are statutory restrictions on the permissible terms<sup>10</sup>.

1 See para 770 post.

2 See para 778 et seq post.

3 See para 797 et seq post.

4 See para 1012 post; and DAMAGES.

5 As to collateral contracts generally see para 753 ante.

6 *Arcos Ltd v Ronaasen & Sons Ltd* [1933] AC 470, HL (sale of staves of half-inch thickness. Of staves delivered, only 5% complied, but other 95% nearly all less than nine-sixteenth inch thickness. Staves merchantable for their intended purpose. Held: buyer entitled to reject staves as not complying with their description).

7 See para 888 et seq post.

8 I.e. in the torts of deceit or negligent misstatement: see paras 610, 759 ante.

9 See para 989 et seq post.

10 See para 790 et seq post.

### **UPDATE**

### **769 Contractual terms**

NOTE 6--See also *Laminates Acquisition Co v BR Australia Ltd* [2003] EWHC 2540 (Comm), [2004] All ER (Comm) 737 (notice requirements not fully comply with).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(i) In general/770. Express terms.

### **770. Express terms.**

The formation of written contracts and the incorporation of written terms in oral contracts has already been considered<sup>1</sup>, and the special example of standard form contracts is referred to below<sup>2</sup>; but where there is such a contractual document, it by no means follows that that document will contain all the terms agreed between the parties. Leaving aside the possibility of implied terms<sup>3</sup>, there may be: (1) express oral terms, for most contracts may be made wholly or partly by word of mouth<sup>4</sup>; or (2) a collateral contract<sup>5</sup>.

Where there is a contractual document, the question whether the agreement between the parties contains additional, or even contradictory<sup>6</sup>, oral terms is one of fact, to be decided by extrinsic evidence<sup>7</sup>. Once all the express terms of a contract have been ascertained, their meaning is a matter of construction<sup>8</sup>.

1 See paras 685-689 ante. It is competent for the parties to incorporate in their contract even express terms which are impossible to perform: *Eurico SpA v Philipp Bros, The Epaphus* [1987] 2 Lloyd's Rep 215, CA; and presumably the contract should then be treated as one that it is impossible to perform (see para 888 et seq post).

2 See para 771 post.

3 See para 778 et seq post.

4 See para 620 et seq ante.

5 As to collateral contracts generally see para 753 ante.

6 See eg para 802 note 16 post.

7 See paras 690-700 ante. For a general discussion on the admissibility of extrinsic evidence see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 185-213.

8 See para 772 et seq post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(i) In general/771. Standard form contracts.

### 771. Standard form contracts.

Many contracts are made in<sup>1</sup>, or incorporate<sup>2</sup>, standard trading forms<sup>3</sup>. Generally, the party putting forward the document, the proferens, will have a different standard form for each type of contract he may wish to make, and will envisage that his appropriate standard form will in any particular case only be varied in so far as the circumstances of that contract necessarily require<sup>4</sup>. In many cases, the form of such documents is settled by a trade association for use by its members<sup>5</sup> and in others it may be provided by statute<sup>6</sup> or under statutory authority<sup>7</sup>. In some respects, the freedom to decide whether or not to contract may be circumscribed by anti-discrimination laws as regards sex<sup>8</sup>, racial group<sup>9</sup> or the stifling of competition<sup>10</sup>. In others, statute may limit the terms of the transaction, as in respect of transactions<sup>11</sup> with utilities<sup>12</sup>. Further, the terms which may be agreed may be circumscribed by public policy<sup>13</sup>.

In commercial transactions, standard form contracts are a useful device for saving time<sup>14</sup> and allocating risk<sup>15</sup>. Such contracts commonly include express<sup>16</sup> provisions concerning the following matters: arbitration<sup>17</sup>; consideration<sup>18</sup>; choice of laws<sup>19</sup>; definitions<sup>20</sup>; exclusion<sup>21</sup>; express warranties<sup>22</sup>; fee or price<sup>23</sup>; force majeure<sup>24</sup>; indemnities<sup>25</sup>; insurance<sup>26</sup>; jurisdiction<sup>27</sup>; parties<sup>28</sup>; passing of property in sale of goods<sup>29</sup>; land conveyed<sup>30</sup>; risk allocation<sup>31</sup>; variation<sup>32</sup> or waiver<sup>33</sup>. However, their use distorts the nineteenth-century assumption that bargains are freely negotiated, for they leave the person to whom the standard terms are offered only the choice of acceptance or rejection<sup>34</sup>. Moreover, particularly when used by business when contracting with consumers, the device of the standard form contract has been used to exploit economic inequality<sup>35</sup>. The common law has leaned against such devices<sup>36</sup> and statute has intervened in an attempt to redress the balance; particularly where the proferens is supplying goods or services to private consumers, unfair terms have been avoided<sup>37</sup>, standard form terms made subject to a test of reasonableness<sup>38</sup> and some exclusion clauses limited or abrogated<sup>39</sup>.

The expressions 'standard form contract' or 'standard form terms' was originally a common law description<sup>40</sup>; but nowadays this overlaps with the statutory appellations 'terms not individually negotiated'<sup>41</sup> and 'written standard terms'<sup>42</sup>.

1 As to contracts made by signature on the document containing the standard terms see para 686 ante.

2 See eg *British Crane Hire Corpn Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA; *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL; *Shearson Lehman Inc v MacLaine, Watson & Co Ltd* [1989] 2 Lloyd's Rep 570; *SIAT di del Ferro v Tradax Overseas SA* [1979] Abr para 2336, CA. As to the incorporation of written standard terms otherwise than by signature see paras 688-689 ante. As to the incorporation of exclusion clauses see paras 801-802 post.

3 References to particular standard form contracts will be found in the title appropriate to the subject matter: see eg the RIBA Standard Form of Building Contract and others in BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 2. The Plain English Campaign is an initiative by the National Consumers Council to encourage the use of plain English in standard forms. See also the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 6; and para 792 post.

4 As to the difficulties which may arise where each party is intending to contract according to his own standard form see para 664 ante.

5 Eg the Royal Institute of British Architects (see note 3 supra); the Institute of Freight Forwarders (see also CARRIAGE AND CARRIERS vol 7 (2008) PARA 71 et seq); the London Cattle Food Trade Association; the Law Society's Conditions of Sale. Employment contracts were at one time frequently negotiated on behalf of individual employees by trade unions: see generally EMPLOYMENT vol 40 (2009) PARA 846 et seq.

6 See eg the Carriers Act 1830 s 4 (as amended); the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule.

7 See eg the Companies (Tables A to F) Regulations, SI 1985/805 (as amended); and COMPANIES.

8 See the Sex Discrimination Act 1975 Pts II, III (ss 6-36) (as amended); and DISCRIMINATION vol 13 (2007 Reissue) para 360 et seq.

9 See the Race Relations Act 1976 Pts II, III (ss 4-27) (as amended); and DISCRIMINATION vol 13 (2007 Reissue) para 446 et seq.

10 See para 866 post.

11 Because of the statutory prescription of terms (see note 12 infra), the relationship may not be regarded as contractual: *Read v Croydon Corpn* [1938] 4 All ER 631; *Norweb plc v Dixon* [1995] 3 All ER 952, [1995] 1 WLR 636, DC.

12 The utilities are under a statutory duty to provide the service: see eg the Gas Act 1986 s 10 (as substituted) (duty to connect certain premises); the Electricity Act 1989 s 16; and FUEL AND ENERGY vol 19(2) (2007 Reissue) paras 836-839, 1094 et seq.

13 See *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, [1996] 3 All ER 545, CA; and para 841 et seq post.

14 As to the dangers where both sides put forward their own standard terms (the battle of the forms) see para 664 ante.

15 Examples are bills of lading; charterparties; policies of insurance; contracts of sale in the commodity markets: see *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 624, [1974] 1 WLR 1308 at 1316, HL, per Lord Diplock. See also notes 3, 5 supra.

16 As to implied terms see para 778 et seq post.

17 As to arbitration clauses see *Scott v Avery* (1856) 5 HL Cas 811; and ARBITRATION vol 2 (2008) PARA 1213 et seq.

18 As to consideration see para 727 et seq ante. As to the interpretation of receipt clauses see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 224-225.

19 As to choice of laws clauses see CONFLICT OF LAWS.

20 As to interpretation see para 772 et seq post.

21 As to exclusion clauses see para 797 et seq post.

22 See para 770 ante.

23 See eg *Swiss Bank Corpn v Parry* (1995) Times, 9 February; *BP Australia Ltd v Nabalco Pty Ltd* (1977) 16 ALR 207, PC. As to price escalation clauses see para 1019 post.

24 As to force majeure clauses see para 906 post.

25 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq. As to statutory control of indemnities see the Unfair Contract Terms Act 1977 s 4; and para 824 post.

26 See INSURANCE.

27 As to attempts to oust the jurisdiction of the court see para 856 post.

28 See paras 604-605 ante. This will be relevant for the purposes of the rule that consideration must move from the promisee (see para 734 ante) and the doctrine of privity (see para 748 ante).

29 As to contractual provisions relating to the passing of property see the Sale of Goods Act 1979 s 17(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 112.

30 As to the interpretation of the (real) property conveyed see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 226-241.

31 As to the allocation of risk in contracts of carriage, repair and sale see CARRIAGE AND CARRIERS; SALE OF GOODS AND SUPPLY OF SERVICES.

32 See eg *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918, CA. As to variation of contract see para 1019 et seq post.

33 As to waiver see generally para 1025 et seq post.

34 As to the notion of freedom of contract see para 602 ante. As to the monopolistic aspect of such situations see generally EMPLOYMENT vol 39 (2009) PARA 123 et seq.

35 According to Lord Diplock in *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 624, [1974] 1 WLR 1308 at 1316, HL, the ticket cases in the nineteenth century were probably the first examples (as to which see para 689 ante). For modern examples see the standard forms used for the retail supply of motor vehicles and regulated agreements. As to regulated agreements see CONSUMER CREDIT vol 9(1) (Reissue) para 79.

36 Eg by the contra proferentem rule of construction: see paras 772, 800 post. Such devices will also fall foul of the good faith doctrine: see para 613 ante.

37 Ie by the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see para 790 et seq post.

38 Ie by the Unfair Contract Terms Act 1977 s 3: see para 823 post.

39 Ie by ibid ss 5, 6, 7 (as amended): see paras 825-827 post.

40 *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 624, [1974] 1 WLR 1308 at 1316, HL.

41 See the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 3(1); and para 791 post.

42 See the Unfair Contract Terms Act 1977 s 3(1); and para 823 post.

## UPDATE

### 771 Standard form contracts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--SI 1994/3159 reg 6 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 7.

NOTE 23--See *Esso Petroleum Co Ltd v Addison* [2004] EWCA Civ 1470, [2004] All ER (D) 217 (Nov); *BP Exploration Operating Co Ltd v Dolphin Drilling Ltd* [2009] EWHC 3119 (Comm), [2009] All ER (D) 48 (Dec).

NOTE 37--SI 1994/3159 now SI 1999/2083.

NOTES 38, 39--As to interpretation of standard exemption clause in contract of reinsurance see *Royal and Sun Alliance Insurance plc v Dornoch Ltd* [2005] EWCA Civ 238, [2005] 1 All ER (Comm) 590; *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* [2007] EWCA Civ 1208, [2007] All ER (D) 357 (Nov).

NOTES 41, 42--SI 1994/3159 reg 3(1) now SI 1999/2083 reg 4(1).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(ii) Interpretation of Express Contractual Terms/772. In general.

## (ii) Interpretation of Express Contractual Terms

### 772. In general.

The object of all interpretation of a written contract<sup>1</sup> is to discover the real intention of the parties<sup>2</sup>. Where a general principle for the construction of a contract has once been laid down, and that construction comes to be accepted and people afterwards make contracts on that understanding, the court will usually adhere to that recognised construction and make the most accurate application of it in the circumstances of the particular case, notwithstanding that it may have been applied differently in other cases<sup>3</sup>. However, if it is clear from the background that the parties have used the wrong words or syntax, or that something must have gone wrong with the language used, the court is not obliged to attribute to the parties an intention which they plainly could not have had<sup>4</sup>. There are a few statutory provisions relating to the interpretation of contracts<sup>5</sup>; and, where these prescribe that certain words shall have particular meanings, those prescribed meanings will override the common law<sup>6</sup>.

At common law, the intention of the parties to a written contract must be gathered from the written document<sup>7</sup>, read in the light of any admissible extrinsic evidence<sup>8</sup> and implied terms<sup>9</sup>. The classical overriding presumption was that the parties intended what they actually said<sup>10</sup>, in so far as this differed from what they meant to say<sup>11</sup>, or what one of them meant to say<sup>12</sup>. Within these parameters, the courts have developed a number of canons to aid the process of construction<sup>13</sup>.

Special rules apply in relation to joint and several promises<sup>14</sup>.

1 For observations on computerised records see *Derby & Co Ltd v Weldon (No 9)*[1991] 2 All ER 901, [1991] 1 WLR 652. The interpretation of contracts is considered generally in DEEDS AND OTHER INSTRUMENTS. The distinction between construction and rectification of a contract is stated in *IRC v Raphae*[1935] AC 96 at 142, HL, per Lord Wright.

2 See eg *Mendelssohn v Normand Ltd*[1970] 1 QB 177, [1969] 2 All ER 1215, CA; *Mitsui Construction Co Ltd v A-G of Hong Kong* [1986] LRC (Comm) 245, PC. The rules are the same for law and equity (*Gladstone v Birley* (1817) 2 Mer 401); and simple contracts and deeds (*Seddon v Senate* (1810) 13 East 63 at 74 per Lord Ellenborough CJ): see DEEDS AND OTHER INSTRUMENTS. As to the incorporation of written terms into oral contracts see para 688 ante; and as to signed contracts see para 686 ante.

3 *Browning v Wright* (1799) 2 Bos & P 13 at 24 per Lord Eldon CJ; *A/S Awilco v Fulvia Spa di Navigazione, The Chikuma*[1981] 1 All ER 652, [1981] 1 WLR 314, HL; and see DEEDS AND OTHER INSTRUMENTS.

4 *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society*[1998] 1 All ER 98, HL; and see para 777 post.

5 See the Law of Property Act 1925 s 61; the Interpretation Act 1978 s 5, Sch 1 (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 171; STATUTES.

6 *Master and Brethren of the Hospital of St Cross v Lord Howard de Walden* (1795) 6 Term Rep 338.

7 'The common and universal principle ought to be applied: namely, that [a contract] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole agreement, and that greater regard is to be had to the clear intention of parties than to any particular words which they may have used in the expression of their intent': *Ford v Beech*(1848) 11 QB 852 at 866, Exch Ch, per Parke B. See the cases on the interpretation of standard form contracts, eg *Louis Dreyfus et Cie v Parnaso Cia Naviera SA*[1959] 1 QB 498, [1959] 1 All ER 502 (revsd on the facts [1960] 2 QB

49, [1960] 1 All ER 759, CA (charterparty)); *LCC v Henry Boot & Sons Ltd* [1959] 3 All ER 636, [1959] 1 WLR 1069, HL (building contract); *The Merak* [1965] P 223, [1965] 1 All ER 230, CA (charterparty). Extrinsic evidence may be admitted as an aid to interpretation, eg as in *Shannon Ltd v Venner Ltd* [1965] Ch 682, [1965] 1 All ER 590, CA (conveyance of easement); and see para 690-700 note 25 ante. Generally, however, the court may not look at pre-contract negotiations (see *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL; and para 622 note 10 ante); but for possible exceptions see note 8 infra. For a general discussion of the rules of interpretation see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 164-274. As to words and phrases judicially considered see the index to the *All England Law Reports*; and *Words and Phrases Legally Defined* (2nd Edn).

8 *Scottish Power plc v Britoil (Exploration) Ltd* (1997) Times, 2 December, CA (consideration of the surrounding circumstances should be confined to the facts which both parties would have known when the contract was made). For the parol evidence rule and its exceptions see paras 622, 690-700 ante.

9 An express term excludes any implied term with regard to the same subject matter (*expressum facit cessare tacitum*): see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 182. As to implied terms see para 778 et seq post.

10 See *IRC v Raphael* [1935] AC 96 at 142, HL, per Lord Wright.

11 *Marshall v Berridge* (1881) 19 ChD 233, CA; but see para 777 post.

12 See *Pannell v Mill* (1846) 3 CB 625 at 638 per Coltman J delivering the judgment of the court.

13 See para 773 et seq post.

14 See para 1083 post.

## UPDATE

### 772 In general

NOTE 2--See *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 2 Lloyd's Rep 606; *Philip Morris Products Inc v Rothmans International Enterprises Ltd* (2001) Times, 17 August, CA; *Amoco (UK) Exploration Co v Teesside Gas Transportation Ltd*; *Amoco (UK) Exploration Co v Imperial Chemical Industries plc* [2001] UKHL 18, [2001] 1 All ER (Comm) 865; *Royle v Manchester City Football Club plc* [2005] EWCA Civ 195, [2005] All ER (D) 129 (Mar); *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577; *Thames Water Utilities Ltd v Heathrow Airport Ltd* [2009] EWCA Civ 992, [2009] All ER (D) 289 (Oct); and *Pink Floyd Music Ltd v EMI Records Ltd* [2010] All ER (D) 101 (Mar).

See *Nicholls v Greenwich LBC* [2003] EWCA Civ 46, [2003] ICR 1020 (statutory cap on pension entitlement not applying to contract for payment predating legislation).

NOTE 4--A contract is to be construed from the perspective of a reasonable observer equipped with all the background information reasonably ascertainable at the time the contract was entered into: *Biggin Hill Airport Ltd v Bromley LBC* [2001] All ER (D) 136 (Jul), CA.

NOTE 7--See also *Forrest v Glasser* [2006] EWCA Civ 1086, [2006] 2 Lloyd's Rep 392; *McCarthy v McCarthy & Stone plc* [2007] EWCA Civ 664, [2008] 1 All ER 221 (share option scheme); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [2009] 4 All ER 677 (pre-contractual negotiations inadmissible); and *Estor Ltd v Multifit (UK) Ltd* [2009] EWHC 2565 (TCC), [2009] All ER (D) 202 (Nov) (evidence of negotiations for the purpose of drawing inferences about meaning of contract not excluded).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(ii) Interpretation of Express Contractual Terms/773. The meaning of words; lists of words.

### 773. The meaning of words; lists of words.

Prima facie, ordinary words are to be taken in their ordinary sense<sup>1</sup>, which is that which the ordinary usage of society applies to them<sup>2</sup>; technical words are construed in their technical sense<sup>3</sup>; and allowance must be made for local usage<sup>4</sup>. However, the above-mentioned rules may be excluded and a special meaning substituted where this is necessitated by the subject matter or context<sup>5</sup>; or where there would otherwise be produced absurdity or inconsistency<sup>6</sup>. General words are to be construed according to the nature of the circumstances or person<sup>7</sup>. In the case of ambiguity, but not otherwise<sup>8</sup>, ambiguous words may be construed in the light of recitals and other parts of the contract<sup>9</sup>.

Where there is a list of specific things of a similar class followed by general words<sup>10</sup>, there is a presumption that the general words are to be read in the light of the prior particularised words<sup>11</sup>: this rule of statutory construction<sup>12</sup> also applies to contracts<sup>13</sup> but may be weaker in the context of commercial contracts<sup>14</sup>.

In a contract drafted by laymen, there is no presumption against surplusage<sup>15</sup>.

1 *Robertson v French* (1803) 4 East 130 at 135 per Lord Ellenborough.

2 *Shore v A-G, ex rel Wilson* (1842) 9 Cl & Fin 355 at 527, HL, per Coleridge J.

3 *Shore v A-G, ex rel Wilson* (1842) 9 Cl & Fin 355 at 525, HL, per Coleridge J. But see para 776 note 2 post.

4 *Shore v A-G, ex rel Wilson* (1842) 9 Cl & Fin 355 at 555, HL, per Parke B.

5 *Doe d Freeland v Burt* (1787) 1 Term Rep 701 at 703 per Ashurst J. As to the use of the word 'conditions' see para 962 post.

6 *Caledonian Rly v North British Rly* (1881) 6 App Cas 114 at 130, HL, per Lord Blackburn (absurdity); *Re Birks* [1900] 1 Ch 417 at 418, CA, per Lindley MR (inconsistency: but see *Watson v Haggitt* [1928] AC 127, PC); *Re Levy, ex p Walton* (1881) 17 ChD 746 at 751, CA, per Jessel MR (unreasonable result).

7 See *West London Rly Co v London and North Western Rly Co* (1853) 11 CB 327 at 356 per Parke B. But, if the intention is clear, it is prima facie binding, however capricious: *Lloyd v Lloyd* (1837) 2 My & Cr 192 at 202 per Lord Cottenham LC.

8 *Leggott v Barrett* (1880) 15 ChD 306 at 311, CA, per Brett LJ.

9 *Re Michell's Trusts* (1878) 9 ChD 5 at 9 per Jessel MR.

10 *le ejusdem generis* (of the same class). Contra where the specific things have nothing in common (*SS Magnhild v McIntyre Bros & Co* [1920] 3 KB 321); or where there is only one specific thing mentioned (*R v Special Comrs, ex p Shaftesbury Homes and Arethusa Training Ship* [1923] 1 KB 393, CA).

11 *Cullen v Butler* (1816) 5 M & S 461; *Harrison v Blackburn* (1864) 17 CBNS 678; *Stott (Baltic) Steamers v Marten* [1916] 1 AC 304, HL; *Jones v Oceanic Steam Navigation Co* [1924] 2 KB 730. Contra where the general words are followed by a list of specific things, because the list is then regarded as merely examples of the general term: *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175, HL.

12 *Hadley v Perks* (1866) LR 1 QB 444 at 457 per Blackburn J; and see STATUTES vol 44(1) (Reissue) paras 1484-1485.

13 *Harrison v Blackburn* (1864) 17 CBNS 678.

14 See *Anderson v Anderson* [1895] 1 QB 749, CA; *Larson v Sylvester* [1908] AC 295, HL; *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 KB 240, [1950] 2 All ER 618, CA; *PJ Van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep 240; cf *Whittaker v Kershaw* (1890) 45 ChD 320, CA; *SS Knutsford Ltd v Tillmans & Co* [1908] AC 406, HL. See also *The Makhutai* [1996] AC 650, [1996] 3 All ER 502, PC; and para 817 note 11 post.

15 *Royal Greek Government v Minister of Transport* (1940) 83 Ll L Rep 228 at 235 per Devlin J; *Total Transport Corp v Arcadia Petroleum Ltd, The Euras* (1997) Times, 16 December, CA; and see para 774 note 10 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(ii) Interpretation of Express Contractual Terms/774.  
Construction of the contract as a whole.

#### **774. Construction of the contract as a whole.**

The contract must be construed as a whole in order to ascertain the true meaning of its several clauses<sup>1</sup>. Where the contract is to be ascertained from a series of letters or documents, all the letters or documents must be looked at<sup>2</sup>; but, where the contract has in fact been reduced to writing, the court is not entitled to consider antecedent acts or correspondence<sup>3</sup>, for instance, prior drafts or alterations<sup>4</sup>. Where the parties utilise a written standard form<sup>5</sup>, to which is then added written words or clauses, *prima facie* the actual words written or spoken have greater effect than the printed ones<sup>6</sup>; but the parties may stipulate in the standard form that the written words are not to override the printed ones<sup>7</sup>. The court may give effect to the intention of the parties by transposing words<sup>8</sup>; supplying omitted words<sup>9</sup>; rejecting misnomers or surplusage<sup>10</sup>; correcting grammatical errors<sup>11</sup>; and construing ambiguities to save a document<sup>12</sup>. There is a presumption that a party cannot use a contractual provision to rely on his own breach<sup>13</sup>.

1 *Throckmerton v Tracy* (1555) 1 Plowd 145 at 161; *Henniker-Major v Daniel Smith* [1991] 12 EG 58, CA. As to the effect of recitals see *Shell Tankers (UK) Ltd v Astro Comino Armadora SA* [1981] 2 Lloyd's Rep 40, CA; and see further DEEDS AND OTHER INSTRUMENTS. As to performance see para 921 et seq post.

2 *Hussey v Horne-Payne* (1879) 4 App Cas 311, HL; and see para 668 note 2 ante; and DEEDS AND OTHER INSTRUMENTS 13 (2007 Reissue) para 175.

3 *Inglis v Buttery* (1878) 3 App Cas 552, HL; and see DEEDS AND OTHER INSTRUMENTS 13 (2007 Reissue) para 175.

4 Because extrinsic evidence is not normally admissible to construe a written contract (see paras 622, 690-700 ante): *Inglis v Buttery* (1878) 3 App Cas 552 at 558, 569, 576, HL (cannot look at prior state of document altered during negotiations). But see *Punjab National Bank v de Boinville* [1992] 3 All ER 104, [1992] 1 WLR 1138, CA.

5 See para 771 ante.

6 Because the written words are those selected by the actual parties: *Hadjipateras v S Weigall & Co* (1918) 34 TLR 360; *Central Meat Products Co Ltd v JV McDaniel Ltd* [1952] 1 Lloyd's Rep 562; *Société d'Avances Commerciales (London) Ltd v A Besse & Co (London) Ltd* [1952] 1 TLR 644; *The Brabant* [1967] 1 QB 588, [1966] 1 All ER 961. But see *R Simon & Co Ltd v Peder P Hedegaard AS* [1955] 1 Lloyd's Rep 299; *A Davies & Co (Shopfitters) Ltd v William Old Ltd* (1969) 67 LGR 395; and para 807 note 5 post. As to overriding oral undertakings see *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA; *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA.

7 *English Industrial Estates Corp v George Wimpey & Co Ltd* [1973] 1 Lloyd's Rep 118, CA. Where some of the printed words, by oversight, are not struck out, the court have confined the operative words to those applicable in the circumstance: *Baumwoll Manufactur von Scheibler v Furness* [1893] AC 8 at 15, HL; *Glynn v Margetson* [1893] AC 351 at 357, HL.

8 *Fenton v Fenton* (1837) 1 Dr & Wal 66.

9 *Elliott's Case* (1777) 2 East PC 951 ('pounds' & '£' omitted); *Mourmand v Le Clair* [1903] 2 KB 216. See also *Tropwood AG of Zug v Jade Enterprises, The Tropwind* [1982] 1 Lloyd's Rep 232, CA.

10 *Falsa demonstratio non nocet cum de corpore constat* (a false description does not vitiate when there is no doubt as to who is the person meant): *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL; *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733; *Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd* [1975] 2 All ER 549, [1975] 1 WLR 1281, CA; *Nittan (UK) v Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep 633, CA; *Lamport & Holt Lines Ltd v Coubro & Scrutton*

(*M & I Ltd* [1981] 2 Lloyd's Rep 659 (affd [1982] 2 Lloyd's Rep 42, CA); *Mohammed bin Abdul Rahman Orri v Seawind Navigation Co SA, The Winner* [1986] 1 Lloyd's Rep 36. See also para 773 note 15 ante.

11 *Ewing v Ewing* (1882) 8 App Cas 822, HL; and see DEEDS AND OTHER INSTRUMENTS 13 (2007 Reissue) para 169.

12 *Ut res magis valeat quam pereat* ('it is better for a thing to have effect than to be made void'): *Haigh v Brooks* (1839) 10 A & E 309; *Broom v Batchelor* (1856) 1 H & N 255. Similarly, a construction which would render a contract legal is preferred over one which would make it illegal: *Harrington v Klopogge* (1785) 2 Brod & Bing 678 note (a).

13 *Alghussein Establishment v Eton College* [1991] 1 All ER 267, [1988] 1 WLR 587, HL; *Micklefield v SAC Technology Ltd* [1991] 1 All ER 275, [1990] 1 WLR 1002. But see *Thornton v Abbey National plc* (1993) Times, 4 March, CA. Alternatively, this canon may be regarded as depending on an implied term (see para 786 post); or on the maxim that nobody can take advantage of his own wrong (*Total Transport Corp v Amoco Trading Co, The Altus* [1985] 1 Lloyd's Rep 423 at 426). As to good faith dealings see para 613 ante.

## UPDATE

### 774 Construction of the contract as a whole

NOTES 8-12--A clause should be construed so as to provide for inconsistency only if the language of the clause drives one to inconsistency: *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (No 2), The Seafloater* [2001] 1 All ER (Comm) 240, [2001] 1 Lloyd's Rep 341, CA, per Waller LJ.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(ii) Interpretation of Express Contractual Terms/775. Intention to be given effect.

### **775. Intention to be given effect.**

If the intention of the parties can be ascertained from the writing, the court will give effect to that intention<sup>1</sup>, notwithstanding ambiguities in the words used or defects in the operation of the contract<sup>2</sup>. But, where the intention of the parties is not sufficiently clear, the court will not make a contract for them in order to prevent the whole agreement failing on grounds of uncertainty or otherwise<sup>3</sup>. Where a document is contradictory, later provisions prevail over earlier ones<sup>4</sup>. The wording of clauses prevails over headings<sup>5</sup>.

1 Eg in determining whether terms are dependent or independent: see para 967 post.

2 *Moody v Surridge* (1798) 2 Esp 633 at 634; *Peng Aun Lim v McLean* [1997] 5 CL 122, PC; *Director of Savings v Woolf* (1997) Times, 9 July; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 164 et seq.

3 *Mills v Dunham* [1891] 1 Ch 576 at 580, CA; *Local Authority Services Co Ltd v Edinburgh City Council* 1997 SLT 124 OH (S). As to uncertainty removable by election see *Mervyn v Lyds* (1553) 1 Dyer 90a at 91a; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 164 et seq.

4 *Aries Powerplant Ltd v ECE Systems Ltd* (1996) 45 ConLR 111; but see para 807 note 2 post.

5 *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540.

### **UPDATE**

### **775 Intention to be given effect**

NOTE 1--See *Bromarin AB v IMD Investments Ltd* [1999] STC 301, CA (where parties to a contract contemplated one event, but did not consider the possibility of a second event occurring, the task of the court is to decide, in the light of the contract, what the parties must be taken to have intended in relation to the second event).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(1) REPRESENTATIONS AND TERMS/(ii) Interpretation of Express Contractual Terms/776. Construction against the originator; the *contra proferentem* rule.

### **776. Construction against the originator; the *contra proferentem* rule.**

If there is a doubt as to the meaning of a contract and that doubt can be removed by construing the contract against the proferens (the originator), this will be done<sup>1</sup>. This rule has achieved particular prominence in the context of exclusion clauses<sup>2</sup> and statutory form in respect of consumer supplies<sup>3</sup>. It is for consideration whether this rule should also be applied to anti-waiver clauses<sup>4</sup>.

1 *Verba fortius accipiuntur contra proferentem* (words are to be interpreted most strongly against him who uses them: the *contra proferentem* rule): see *Doe d Davies v Williams* (1788) 1 Hy BI 25; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 178. Contra where there is no ambiguity: *Borradaile v Hunter* (1843) 5 Man & G 639; *Thake v Maurice* [1986] QB 644, [1986] 1 All ER 497, CA; *Macey v Qazi* (1987) Times, 13 January, CA. Similarly, where a clause is for the benefit of both parties: *GA Estates Ltd v Caviapen Trustees Ltd* 1993 SLT 1037, OH. See further DEEDS AND OTHER INSTRUMENTS.

2 See para 803 post. A similar approach is used for indemnities (see para 800 post); price clauses (see para 942 post); and the classification of terms (see para 994 post).

3 See the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 6; and para 792 post.

4 See para 1028 post.

### **UPDATE**

### **776 Construction against the originator; the *contra proferentem* rule**

NOTE 3--SI 1994/3159 reg 6 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 7.



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Mercantile contracts.

### **777. Mercantile contracts.**

Whilst it has been stated that mercantile contracts follow the traditional rules of construction<sup>1</sup>, the courts have also said that they will construe mercantile contracts to make good commercial sense<sup>2</sup>: for instance, words employed may be given a technical meaning<sup>3</sup> or fall to be construed according to the custom of merchants<sup>4</sup>; or a broad approach may be taken in construing an insurance policy<sup>5</sup>; or contracts expressed to last indefinitely may be terminated on notice<sup>6</sup>; or 'profits' may refer to group profits<sup>7</sup>. Further, there is a principle of construction that clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of contract<sup>8</sup>; and there is a weak presumption in relation to the meaning of general words following a list of specific things<sup>9</sup>.

The above rules assume that, in the absence of ambiguity<sup>10</sup>, the construction of a document should always be upon the basis of the natural and ordinary meaning of the words used, but there is now authority that this is not the case where words have not been used in a natural and ordinary way<sup>11</sup>. It has been held that certain recent decisions<sup>12</sup> have wrought a fundamental change in the principles of construction and that almost all the old intellectual baggage of 'legal' interpretation has been discarded<sup>13</sup>. The principles of construction have been summarised as follows:

- 100 (1) interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract<sup>14</sup>;
- 101 (2) ... subject to the requirement that it should have been reasonably available to the parties and to the exception mentioned in head (3) below, that background includes absolutely everything which would have affected the way in which the language of the document would have been understood by a reasonable person<sup>15</sup>;
- 102 (3) the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent<sup>16</sup>; they are admissible only in an action for rectification<sup>17</sup>. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in real life<sup>18</sup>;
- 103 (4) the meaning which a document or any other utterance would convey to a reasonable person is not the same thing as the meaning of its words<sup>19</sup>;
- 104 (5) [despite the rule that words should be given their natural and ordinary meaning], if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had<sup>20</sup>.

1 See *Southwell v Bowditch* (1876) 1 CPD 374 at 376, CA, per Jessel MR. See also *National Coal Board v Wm Neill & Son* [1985] QB 300, [1984] 1 All ER 555, DC.

2 See *Miramar Maritime Corpn v Holborn Oil Trading Ltd* [1984] AC 676 at 682, [1984] 2 All ER 326 at 327-328, HL, per Lord Diplock; *Antaios Compania Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 at 201, [1984] 3 All ER 229 at 233-234, HL, per Lord Diplock. See also *Bunge SA v Kruse* [1977] 1 Lloyd's Rep 492, CA; *Levison v Farin* [1978] 2 All ER 1149; *Computer & Systems Engineering plc v John Lelliott (Ilford) Ltd* (1990) 54 BLR 1, CA.

3 See eg *Care Shipping Corpn v Itex Itagrani Export SA, The Cebu (No 2)* [1993] QB 1, [1992] 1 All ER 91 ('sub-freights').

4 *Re Walkers, Winsor & Hamm and Shaw, Son & Co* [1904] 2 KB 152; *Upjohn v Hitchens, Upjohn v Ford* [1918] 2 KB 48, CA. As to terms implied by commercial custom see para 780 post. The custom should not be inconsistent with the agreement: *Hayton v Irwin* (1879) 5 CPD 130; *The Alhambra* (1881) 6 PD 68; *Re L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348 at 356; *Westacott v Hahn* [1918] 1 KB 495, CA; *Palgrave, Brown & Sons v SS Turid (Owners)* [1922] 1 AC 397, HL.

5 *Punjab National Bank v de Boinville* [1992] 3 All ER 104, [1992] 1 WLR 1138, CA; *Sargent v GRE (UK) Ltd* (1997) Times, 25 April, CA.

6 See para 979 post. As to contracts for a fixed term and contractual licences see paras 980-981 post.

7 See *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

8 See *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883 at 893, [1998] 1 WLR 575 at 585, HL, per Lord Goff; and para 990 post.

9 See para 773 note 14 ante.

10 See para 774 note 12 ante.

11 See *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98, HL (majority view, Lord Lloyd of Berwick dissenting).

12 In the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL, and *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, HL.

13 See *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114-115, HL, per Lord Hoffmann.

14 See generally para 772 ante.

15 The uncertainty to which this may give rise was criticised in *National Bank of Sharjah v Delborg* (9 July 1997, unreported), CA; *Scottish Power plc v Britoil (Exploration) Ltd* (1997) Times, 2 December, CA; and see Price, Commercial Contract Interpretation Through the Looking Glass (1998) 142 Sol Jo 176.

16 See para 774 note 4 ante.

17 As to rectification see para 896 post; and MISTAKE vol 77 (2010) PARA 57 et seq.

18 In construing the relevant claim form in *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98, HL, it was the terms of that form, designed to be read by lawyers, which governed the legal relationship between the parties, not the terms of the explanatory note intended to be read by laymen: see at 115 per Lord Hoffmann, who also stated at 114-115 that the boundaries of the distinction set out in head (3) in the text are in some respects unclear.

19 'The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean': *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 115, HL, per Lord Hoffmann. The background may not merely enable the reasonable person to choose between the possible meanings of words which are ambiguous but even to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945, HL; *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* supra at 115 per Lord Hoffmann.

20 See *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 at 201, [1984] 3 All ER 229 at 233, HL, per Lord Diplock; *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 115, HL, per Lord Hoffmann.

## UPDATE

### 777 Mercantile contracts

NOTE 2--As to the application of a commercially sensible construction to a contract, see *Bank of Scotland v Dunedin Property Investment Co Ltd* 1999 SLT 470, and *City Alliance Ltd v Oxford Forecasting Services Ltd* [2001] 1 All ER (Comm) 233, CA. See also *Zelouf v Republic National Bank of New York* [1999] 2 All ER (Comm) 215; *Lomas v Rab Market Cycles (Master) Fund Ltd* [2009] EWHC 2545 (Ch), [2009] All ER (D) 313 (Oct).

NOTE 11--See *Absalom (on behalf of Lloyd's Syndicate 957) v TCRU Ltd* [2005] EWCA Civ 1586, [2006] 1 All ER (Comm) 375.

NOTE 20--See also *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(i) The Modes of Implication/778. In general.

## **(2) IMPLIED TERMS**

### **(i) The Modes of Implication**

#### **778. In general.**

In addition to the terms which the parties have expressly adopted<sup>1</sup>, there may be other terms imported<sup>2</sup> into the contract<sup>3</sup>, these latter being generally known as 'implied terms', though this nomenclature is misleading in that it covers a number of dissimilar notions. Theoretically, a distinction may be drawn according to whether or not the 'implied' term can be logically implied from the language of the contract<sup>4</sup>.

As a general rule, the courts will enforce not only the terms expressly agreed between the parties, but also those which are to be logically implied from those express terms<sup>5</sup>, including from any recitals<sup>6</sup>. The question of whether a term is to be logically implied from the express terms of the agreement is a matter of construing the intention of the parties, and is considered elsewhere in this title<sup>7</sup>; but examples might include implied terms as to the duration of a contract<sup>8</sup>.

Even where a term may not be logically implied from the words used, the law admits of certain other terms to be implied as follows: (1) terms which the parties probably had in mind but did not express; (2) terms which the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention; and (3) terms which, whether or not the parties had them in mind or would have expressed them if they had foreseen the difficulty, are implied by the court because of the court's view of fairness or policy or in consequence of rules of law. Of these three categories, the first attempts to arrive at the actual intention of the parties, the second at their hypothetical intention, and the third is not really concerned with the intention of the parties except to the extent that the particular rule of law may be overridden by an expressed contrary intention<sup>9</sup>.

In practice, logically implied terms and the other three types of implied terms tend to merge imperceptibly into each other, all the categories being justified to some extent by reference to the intention of the parties<sup>10</sup>; and the distinctions between classes of implied terms tend to be based on convention rather than logic. The conventional distinctions, which will be adopted here, are as follows: (a) terms implied by custom<sup>11</sup>; (b) terms implied by law<sup>12</sup>; and (c) other terms implied by the courts<sup>13</sup>. The relationship between the parties<sup>14</sup> may be a matter of profound importance in determining whether a contract contains a term implied under one of these heads.

1 As to express terms see para 770 ante.

2 The implication of terms is a matter of law for the court: *Re Comptoir Commercial Anversois v Power, Son & Co*[1920] 1 KB 868 at 899, CA, per Scrutton LJ; and see *IRC v Raphael*[1935] AC 96, HL; *O'Brien v Associated Fire Alarms Ltd*[1969] 1 All ER 93, [1968] 1 WLR 1916, CA. It has been suggested that the need to utilise implied terms to flesh out contracts is less in those civil law systems where there is a general duty of good faith in the performance of contracts: see Lord Steyn 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433 at 441. See further para 613 ante.

3 This is to assume that there is a contract. The contract itself may be implied: see generally para 618 note 3 ante. Whether a contract is to be implied in such circumstances will frequently raise the issue of intention to create legal relations, as to which see para 718 et seq ante.

4 See Glanville Williams 'Language and the Law' (1945) 61 LQR 401.

5 See eg *AE Farr Ltd v Admiralty*[1953] 2 All ER 512, [1953] 1 WLR 965; *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd*[1956] 1 QB 529, [1956] 1 All ER 536, CA; *Tappenden v Artus*[1964] 2 QB 185, [1963] 3 All ER 213, CA; *Gardiner v Moore*[1969] 1 QB 55, [1966] 1 All ER 365; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners*[1975] 3 All ER 99, [1975] 1 WLR 1095, CA.

6 See the cases on the implication of a covenant from the words of recital in a deed (eg *Aspdin v Austin*(1844) 5 QB 671 at 683 per Lord Denman CJ); and for the implication of covenants into deeds by construction generally see *Wood v Copper Miners' Co* (1849) 7 CB 906 at 936 per Wilde CJ. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 250.

7 See para 772 et seq ante.

8 Eg the question whether a contract for an indefinite period may be determinable by reasonable notice: *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd*[1948] AC 173, [1947] 2 All ER 331, HL (as to contractual licences of land see LANDLORD AND TENANT); *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*[1978] 3 All ER 769, [1978] 1 WLR 1387, CA. Cf the determination of indefinite offers: see para 646 note 3 ante.

9 See note 4 supra.

10 Matters are the more complicated because not only do the courts tend to some extent to run together the different types of intention, but this is to assume that the parties have a common intention; they may have no joint intention, perhaps because they had no views on the matter, or contradictory views. Cf the problem of determining whether the parties intended a particular representation to become a term of their contract: see para 768 ante.

11 See para 780 post.

12 See para 781 post.

13 See para 782 et seq post.

14 See para 779 post.

## UPDATE

### 778 In general

NOTES--An implied obligation to co-operate cannot be imposed on a party so as to compel him to carry out an act that he either cannot do or the contract relieves him from doing: *North Sea Energy Holdings NV v Petroleum Authority of Thailand*[1999] 1 All ER (Comm) 173, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(i) The Modes of Implication/779. The relationship of the parties.

### **779. The relationship of the parties.**

It would be misleading to think of the implication of terms simply on the basis of an inquiry into the intention of the parties in a particular case<sup>1</sup>. Over the course of time, there has been a convenient tendency to group together those terms which are likely to be imported by reason of the particular relationship between the parties, thus classifying the contract as, for instance, one of bailment, employment, landlord and tenant or sale of goods<sup>2</sup>. In the particular case, therefore, the tendency is first to classify the type of contract, and then to consider all the terms which are normally imported into that type of contract in so far as they do not contradict the express terms of the particular contract<sup>3</sup>. To the extent that the terms which are *prima facie* to be imported into any particular type of contract are already settled, the real issue in any particular case may be into what classification the contract in question falls; and the question may therefore become one of the relationship of the parties rather than their intention<sup>4</sup>.

1 The difficulties inherent in this approach have already been mentioned: see para 778 note 10 ante.

2 This enables the parties in a particular case to agree expressly merely on the basic essentials, or on those terms which are important to them, in the knowledge that the law will supply details to clothe the bare bones of their agreement.

3 See eg *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317, CA (sale of land); *Frisby v British Broadcasting Corp* [1967] Ch 932, [1967] 2 All ER 106 (licence of copyright material); *Bentworth Finance Ltd v Lubert* [1968] 1 QB 680, [1967] 2 All ER 810, CA (hire-purchase agreement); *British School of Motoring Ltd v Simms* [1971] 1 All ER 317 (contract to give driving instruction). As to express and standard terms see paras 770-771 ante.

4 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576, [1957] 1 All ER 125 at 132, HL, per Viscount Simonds. See also *Morgan v Ravey* (1861) 6 H & N 265 (which decided that wherever a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply a promise by each party to do what is to be done by him); and *Re Chappell, ex p Ford* (1885) 16 QBD 305 at 307, CA, per Lord Esher MR; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99 at 103-104, [1975] 1 WLR 1095 at 1100, CA, per Lord Denning MR; *Shell UK Ltd v Lostock Garage Ltd* [1977] 1 All ER 481 at 487, [1976] 1 WLR 1187 at 1196, CA, per Lord Denning MR; *Liverpool City Council v Irwin* [1977] AC 239 at 255, [1976] 2 All ER 39 at 44-45, HL, per Lord Wilberforce and at 258 and 47 per Lord Cross; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 307, [1991] 4 All ER 563 at 571-572, HL. See further para 781 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(i) The Modes of Implication/780. Implication by custom or usage.

### 780. Implication by custom or usage.

It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions in which known usages have been established and have prevailed; and this has been done upon the principle of presuming that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but meant to contract with reference to those known usages<sup>1</sup>. A fortiori, this must be the case where the express agreement is wholly or partly oral<sup>2</sup>.

Thus, in the absence of evidence of a contrary intention<sup>3</sup>, a court may import into a contract any local custom<sup>4</sup> or usage<sup>5</sup> which is notorious<sup>6</sup>, certain<sup>7</sup>, legal<sup>8</sup> and reasonable<sup>9</sup>; and, provided that it can be shown that the custom or usage normally governs the particular type of contract in question, it will be regarded as part of that contract in precisely the same manner as if it had been expressly agreed between the parties<sup>10</sup>.

No doubt the intention of the parties<sup>11</sup> is relevant to the extent that a custom or usage will only be imported into a contract where that contract contains nothing in its express or necessarily implied terms to prevent such inclusion, and is not inconsistent with the tenor of the contract as a whole<sup>12</sup>; but it is somewhat artificial to justify the implication on the basis of the intention of the parties, for it is well established that a custom or usage may be imported into a contract whether or not the parties knew of it<sup>13</sup>.

Even where it is not possible to show a local custom or usage that might be imported into a contract of the particular type before the court, it may be possible to import the term on the basis of the previous course of dealings between the parties, for instance: an implied promise to pay compound interest on a debt<sup>14</sup>; the incorporation of terms printed on the back of 'sold notes'<sup>15</sup>; the obligations of the parties to a commission agency<sup>16</sup>.

1 *Hutton v Warren* (1836) 1 M & W 466 at 475 per Parke B; *Gibson v Small* (1853) 4 HL Cas 353 at 397 per Alderson B; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421 (Stock Exchange usage). For the general rule against the introduction of parol evidence to modify a written agreement see para 622 ante.

2 See eg *Reading v A-G* [1951] AC 507, [1951] 1 All ER 617, HL (soldier held accountable to Crown for money illegally received by him whilst ostensibly acting in military capacity); *Stewart v Reavell's Garage* [1952] 2 QB 545, [1952] 1 All ER 1191 (contract for supply of work and materials); *British Crane Hire Corp v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA (contract to hire plant). Most types of contract may be wholly or partly oral: see para 620 ante.

3 See the text to note 12 infra.

4 As to the meaning of 'local custom' see the *Tanistry Case* (1608) Dav Ir 28 at 31-32; and CUSTOM AND USAGE. Distinguish general custom, which is, of course, the basis of the common law: 1 BI Com 67. As to the implication of terms by the general law see para 781 et seq post.

5 As to the meaning of 'usage' see *Moult v Halliday* [1898] 1 QB 125 at 129, DC; and CUSTOM AND USAGE. A local custom must be of immemorial existence, whereas a usage need not be. As to the distinction between incorporation by (1) trade usage; and (2) course of dealings see note 15 infra.

6 As to custom see *Tyson v Smith* (1838) 9 Ad & El 406 at 421, Ex Ch; and as to usage see *R v Stoke-upon-Trent Inhabitants* (1843) 5 QB 303 at 307; *Re Goetz, Jonas & Co, ex p Trustee* [1898] 1 QB 787 at 795, CA, per AL Smith LJ; *Danowski v Henry Moore Foundation* [1996] CLY 1282, CA; and see further CUSTOM AND USAGE. Cf *Brown v IRC* [1965] AC 244, [1964] 3 All ER 119, HL.

7 As to custom see the *Tanistry Case* (1608) Dav Ir 28 at 33; and as to usage see *Sewell v Corp* (1824) 1 C & P 392 at 393; and see further CUSTOM AND USAGE.

8 As to usage see *Goodwin v Robarts* (1875) LR 10 Exch 337 at 357, Ex Ch; and CUSTOM AND USAGE. Contra local custom: see *Lockwood v Wood* (1844) 6 QB 50 at 64, Ex Ch; and CUSTOM AND USAGE.

9 As to custom see *Wolstanton Ltd and A-G of Duchy of Lancaster v Newcastle-under-Lyme Corp* [1940] AC 860, [1940] 3 All ER 101, HL; and as to usage see *Tucker v Linger* (1883) 8 App Cas 508 at 513, HL; and see further CUSTOM AND USAGE. As to the question of whether the terms of a collective agreement between employers and trades unions may be impliedly incorporated by usage into individual contracts of employment see para 752 note 9 ante.

10 See *Tucker v Linger* (1883) 8 App Cas 508 at 511, HL; and CUSTOM AND USAGE. Cf *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, [1968] 2 All ER 886, CA.

11 See the text and note 1 supra.

12 *AS Sameiling v Grain Importers (Eire) Ltd* [1952] 2 All ER 315; *London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 411 at 420, [1958] 1 WLR 661 at 675, CA, per Jenkins LJ; and see CUSTOM AND USAGE.

13 See *Noble v Kennoway* (1780) 2 Doug KB 510; and CUSTOM AND USAGE.

14 *Calton v Bragg* (1812) 15 East 223 at 228; *Bruce v Hunter* (1813) 3 Camp 467; *Newal v Jones* (1830) Mood & M 449; *Re Marquis of Anglesey, Willmot v Gardner* [1901] 2 Ch 548, CA.

15 *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers' Association Ltd* [1966] 1 All ER 309, [1966] 1 WLR 287, CA; affd on other grounds sub nom *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL. See also *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450; *Mendelsohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA. This principle requires a considerable uniform course of dealings between the parties but it is irrelevant that such a practice was unheard of in the trade generally. Contra the implication of terms by trade usage, where it is essential to show notoriety of the custom but it is irrelevant that the parties are contracting with each other for the first time: see *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA; *Victoria Fur Traders v Roadline (UK)* [1981] 1 Lloyd's Rep 570 (agency point); *Circle Freight International v Medeast Gulf Exports* [1988] 2 Lloyd's Rep 427, CA.

16 *Roberts v Elwells Engineers Ltd* [1972] 2 QB 586, [1972] 2 All ER 890, CA.

## UPDATE

### 780 Implication by custom or usage

NOTE 12--See *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 (Comm), [2004] 1 All ER (Comm) 435 (clause that contract contained entire agreement of parties and was not affected by any other usage or course of dealing excluded implied term based on usage or custom).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(i) The Modes of Implication/781. Implication by law.

### **781. Implication by law.**

There are many cases where, apart from local custom or usage<sup>1</sup>, the common law has recognised a general custom that certain terms be incorporated into particular types of contract<sup>2</sup>. In some of these cases, the rules having been decided by the courts, they have been put into statutory form: an early example was the implied terms in sales of goods<sup>3</sup>. Others include conveyances of interests in land<sup>4</sup>; contracts of marine insurance<sup>5</sup>; contractual licences to enter property<sup>6</sup>; and the indemnity arising upon lawful request made under a charterparty<sup>7</sup>. Frequently, such statutorily implied terms are expressed to give way to a contrary intention<sup>8</sup>; but there are other cases where the terms implied by statute cannot be excluded by any contrary agreement<sup>9</sup>. Yet a further step in the process is that, where statute law has in a particular field codified terms implied at common law, the courts may import those statutory terms into similar transactions by way of analogy<sup>10</sup>; for instance, the statutorily implied term as to fitness in a sale of goods<sup>11</sup> has been imported by analogy into contracts for the manufacture of dentures<sup>12</sup>, repair of a motor car<sup>13</sup>, the erection of scaffolding<sup>14</sup>, and dyeing of a woman's hair<sup>15</sup>; but the courts have shown themselves much more reluctant to import similar terms as to fitness into contracts for the sale<sup>16</sup> or lease<sup>17</sup> of interests in land<sup>18</sup>.

In respect of implied terms in supplies of goods, there has been a second wave of development: not only have the implied terms for sale of goods been re-enacted in expanded form<sup>19</sup>, but virtually identical statutory undertakings have been introduced for analogous transactions<sup>20</sup>, hire-purchase<sup>21</sup> and simple hire<sup>22</sup>; and similar provisions enacted in respect of trading stamp transactions<sup>23</sup> and supplies of services<sup>24</sup>. Subsequently, a range of implied terms has been introduced for package holidays<sup>25</sup>.

Whilst many of the rules referred to above are described as 'implied terms' both by the courts and by statute<sup>26</sup>, it is by no means clear that they represent any kind of attempt to ascertain the intention of the parties<sup>27</sup>. First, some of them cannot be excluded by any contrary agreement<sup>28</sup>; and, conversely, a clause which the law implies as necessary to the contract, whether it is expressed or not, has no independent legal operation when expressed in the contract<sup>29</sup>. Secondly, there is the very complexity of some of the statutorily implied terms<sup>30</sup>, and the subtlety of the distinctions drawn by the courts in importing those terms into analogous transactions<sup>31</sup>. Thirdly, the question of whether any, and if so what, terms should be implied into a particular type of transaction is not only a matter of law<sup>32</sup>, but often appears to be decided exclusively by the citation of earlier cases<sup>33</sup>. Fourthly, even where a statutorily implied term is expressed to give way to a contrary intention, it is not necessarily excluded by a mere 'understanding' to the contrary<sup>34</sup>, but requires a clear indication of a contrary intention<sup>35</sup>. Perhaps the truth is that the ambiguous terminology enables the courts in the first instance to imply terms on the basis of the actual intention of the parties<sup>36</sup>; but later there comes a time when the particular implied term has become so much a part of common practice that the courts begin to import it into all transactions of that type as a matter of course<sup>37</sup>; and the result is a rule of law of the type considered in this paragraph<sup>38</sup>.

The conclusion would appear to be that terms implied by law are not happily described as 'implied terms': they are rather duties which (frequently subject to a contrary intention) are imposed by the law on the parties to particular types of contract<sup>39</sup>. In deciding whether to create such duties, the courts tend to look, not to the intention of the parties<sup>40</sup>, but to considerations of public policy<sup>41</sup>, or perhaps good faith<sup>42</sup>.

1 As to local custom and usage see para 780 ante.

2 *Johnstone v Bloomsbury Health Authority* [1992] QB 333, [1991] 2 All ER 293, CA (implied term as a matter of law that an employer would take reasonable care not to injure employee's health).

3 See the Sale of Goods Act 1893 ss 12-15 (repealed; replaced by the Sale of Goods Act 1979 ss 10-15A (as amended)); note 19 *infra*; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 1.

4 See now the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13); and SALE OF LAND.

5 See eg the Marine Insurance Act 1906 s 39; and INSURANCE vol 25 (2003 Reissue) paras 245, 248, 250-251, 359.

6 See the Occupiers' Liability Act 1957 ss 2, 5; *Sole v WJ Hall Ltd* [1973] QB 574, [1973] 1 All ER 1032; and NEGLIGENCE vol 78 (2010) PARA 36.

7 *Triad Shipping Co v Stellar Chartering and Brokerage Inc, The Island Archon* [1995] 1 All ER 595, [1994] 2 Lloyd's Rep 227, CA.

8 See eg the Marine Insurance Act 1906 s 87. See also the Late Payment of Commercial Debts (Interest) Act 1998 s 1(3), which had not been brought into force at the date at which this volume states the law.

9 See eg the Employment Rights Act 1996 s 203; and see note 28 *infra*. As to modification of contracts by statute see generally para 1021 *post*.

10 *Andrews v Hopkinson* [1957] 1 QB 229 at 237, [1956] 3 All ER 422 at 426 per McNair J.

11 See notes 3 *supra*, 19 *infra*.

12 *Samuels v Davis* [1943] KB 526, [1943] 2 All ER 3, CA; *Young and Marten v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL (contract to supply tiles); *Independent Broadcasting Authority v BICC Construction Ltd* [1980] Abr para 485, HL (contract to erect television mast).

13 See eg *GH Myers & Co v Brent Cross Service Co* [1934] 1 KB 46, DC; and *Stewart v Reavell's Garage* [1952] 2 QB 545, [1952] 1 All ER 1191 (as to goods supplied). As to services provided see BAILMENT vol 3(1) (2005 Reissue) para 69; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 97.

14 *Sims v Foster Wheeler Ltd* [1966] 2 All ER 313, [1966] 1 WLR 769, CA.

15 *Ingham v Emes* [1955] 2 QB 366, [1955] 2 All ER 740, CA.

16 See *Lynch v Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303, CA; *Basildon District Council v JE Lesser (Properties) Ltd* [1985] QB 839, [1985] 1 All ER 20; and SALE OF LAND. Cf as to negligence note 17 *infra*.

17 At common law, there is no implied warranty of fitness in the letting of unfurnished premises (see *Hart v Windsor* (1844) 12 M & W 68; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 422 *et seq*); but in the case of furnished premises there is an implied condition that the premises are fit for human habitation at the beginning of the tenancy (*Smith v Marrable* (1843) 11 M & W 5; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) paras 425-426). Cf liability, with certain exceptions, imposed on the builders, vendors and lessors of certain premises: *Lawrence v Cassel* [1930] 2 KB 83, CA; *Basildon District Council v JE Lesser (Properties) Ltd* [1985] QB 839, [1985] 1 All ER 20; and the provisions of the Defective Premises Act 1972 s 3; see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 79. Contra contractual licences to enter land: see *Francis v Cockrell* (1870) LR 5 QB 501, Ex Ch (decision superseded by the Occupiers' Liability Act 1957 s 5(1)); and NEGLIGENCE vol 78 (2010) PARA 36.

18 In the case of both sales and leases of land, there are now various terms implied by statute: see LANDLORD AND TENANT; SALE OF LAND. As to the position in relation to members of clubs on club premises see CLUBS vol 13 (2009) PARA 259.

19 See the Sale of Goods Act 1979 ss 10-15A (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES.

20 See the Supply of Goods and Services Act 1982 ss 1-5A (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES.

21 See the Supply of Goods (Implied Terms) Act 1973 ss 8-15 (as substituted and amended; s 13 repealed); and CONSUMER CREDIT vol 9(1) (Reissue) para 24.

22 See the Supply of Goods and Services Act 1982 ss 6-11 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES.

23 See the Trading Stamps Act 1964 s 4 (as substituted and amended). As to trading stamp schemes see generally VALUE ADDED TAX vol 49(1) (2005 Reissue) para 213.

24 See the Supply of Goods and Services Act 1982 ss 12-15; *Wilson v Best Travel Ltd* [1993] 1 All ER 353; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 97-99.

25 See the Package Travel, Package Holiday and Package Tour Regulations 1992, SI 1992/3288 (as amended), implementing EC Council Directive 90/314 (OJ L158, 23.6.90, p 59).

26 And prima facie excludable: see eg the Sale of Goods Act 1979 s 55 (as amended); the Supply of Goods (Implied Terms) Act 1973 s 12 (as substituted and amended); the Supply of Goods and Services Act 1982 s 11; and CONSUMER CREDIT; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 11, 102. However, that prima facie right to exclude is limited by statute: see note 28 infra.

27 This is the ordinary justification for the implication of terms: see para 778 ante.

28 See the Unfair Contract Terms Act 1977 ss 6, 7 (as amended); and paras 826-827 post. See also *Johnstone v Bloomsbury Health Authority* [1992] QB 333, [1991] 2 All ER 293, CA.

29 See *Boroughe's Case* (1596) 4 Co Rep 72b at 73b; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185.

30 See eg some of the provisions referred to in notes 19-24 supra.

31 Compare the following pairs of cases: (1) *Francis v Cockrell* (1870) 5 QB 501, Ex Ch (decision superseded by the Occupiers' Liability Act 1957 s 5(1)) and *GH Myers & Co v Brent Cross Service Co* [1934] 1 KB 46, DC; (2) *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL, and *Gloucestershire County Council v Richardson* [1969] 1 AC 480, [1968] 2 All ER 1181, HL.

32 See para 778 note 2 ante.

33 See eg *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281, CA.

34 *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, [1955] 1 All ER 369, HL. Cf the situation with regard to terms implied by the courts: see para 783 note 8 post.

35 See eg *Lynch v Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303, CA; distinguished in *King v Victor Parsons & Co* [1972] 2 All ER 625, [1972] 1 WLR 801 (affd on other grounds [1973] 1 All ER 206, [1973] 1 WLR 29, CA).

36 This is the test for terms implied in fact: see para 782 post.

37 See eg *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817, [1976] 1 WLR 346, CA.

38 See para 782 note 1 post.

39 *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 at 717, [1940] 2 All ER 445 at 455, HL, per Lord Atkin.

40 The danger of using the description 'implied terms' to cover these legal duties is that it may tempt a court to make an inquiry (which, it is submitted, is irrelevant, except in a negative context: see note 35 supra) into the intention of the parties: see *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 574, 578, [1957] 1 All ER 125 at 131, 133, 134, HL, per Viscount Simonds, and at 583 and 137 per Lord Morton, where the court nevertheless seemed largely to be concerned with considerations of policy (as to which see note 41 infra).

41 See eg *John v Rees* [1970] Ch 345, [1969] 2 All ER 274. But see *Abbott v Sullivan* [1952] 1 KB 189 at 219, [1952] 1 All ER 226 at 240, CA, where Morris LJ talked in terms of the intention of the parties; for a possible explanation see note 40 supra.

42 See para 613 ante.

## UPDATE

### 781 Implication by law

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 8--As to the commencement of the Late Payment of Commercial Debts (Interest) Act 1998 see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 221.

NOTE 23--1964 Act repealed: Regulatory Reform (Trading Stamps) Order 2005, SI 2005/871.

NOTE 25--See *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003, [2008] 1 All ER 530; and NEGLIGENCE vol 78 (2010) PARA 40.

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## **(ii) Other Terms Implied by the Courts**

### **782. Giving efficacy to contract.**

An implied warranty, or, as it has been called, a covenant in law<sup>1</sup>, as distinguished from an express contract or express warranty<sup>2</sup>, is really founded on the presumed intention of the parties, and upon reason<sup>3</sup>. The implication which the law draws from what must obviously have been the intention of the parties<sup>4</sup>, it draws with the object of giving efficacy to the transaction and preventing such failure of consideration as cannot have been within the contemplation of either side; and in all the cases of implied warranties or covenants in law, it will be found that the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that it should have<sup>5</sup>. In business transactions, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties as businessmen; that is not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances<sup>6</sup>.

The principles laid down in the above words have been frequently invoked by litigating parties: many courts have approved the principles<sup>7</sup>, sometimes applying them and sometimes not<sup>8</sup>. Indeed, it is well settled that the court has no discretion to create a new contract<sup>9</sup>. In every case, the question whether an implication ought or ought not to be made will depend on the particular facts; consequently, it is neither possible nor desirable to lay down any hard and fast rules on the subject, and it must be remembered that the construction of one contract will afford but little guidance for the construction of another unless the facts and surrounding circumstances are practically identical<sup>10</sup>.

A term can only be implied if it is necessary in the business sense to give efficacy to the contract. Two well known tests of business efficacy by involving the officious bystander have been suggested<sup>11</sup>: (1) there is a test which concentrates on the intention of the parties<sup>12</sup>, which has been applied in a number of cases<sup>13</sup>; (2) there is a test which refers to the reasonable person<sup>14</sup>; again, there have been a number of judicial applications of this test<sup>15</sup>. However, the relationship between the two officious bystander tests is not clear. One view is that a term may be implied upon the satisfaction of either test<sup>16</sup>; but this may cause difficulty where the reasonable bystander would have approved the term, but one of the parties would not<sup>17</sup>. Alternatively, it may be that such a term is not to be implied unless both tests are satisfied; that is, both the parties and the reasonable bystander would have approved the implication<sup>18</sup>.

The emphasis on the intention of the parties is logical where a term is implied in fact; but the reasonable bystander test seems rather to echo implication as a matter of law<sup>19</sup>.

1 Whilst the rule purports to be based on the presumed intention of the parties (see the text to notes 4-6 *infra*), from the expressions 'covenant in law' and 'upon reason' (for the latter see the text to note 3 *infra*), it is clear that the rule is not exclusively concerned with the intention of the parties (see further the text and notes 2-19 *infra*; and para 781 *ante*).

2 As to express terms see para 770 *ante*.

3 See also *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 11, CA, per Greer LJ. As to the requirement of reasonableness, and for examples of the implication of reasonable terms, see para 787 *post*.

4 *The Moorcock* (1889) 14 PD 64 at 68, CA; and see *Lamb v Evans*[1893] 1 Ch 218 at 229, CA, per Bowen LJ. In *Nickoll and Knight v Ashton, Edridge & Co*[1901] 2 KB 126, CA, the parties had contracted for the sale and purchase of seed to be shipped by a named ship at a specified date, and it was held that there was no implied warranty that the ship should continue to exist at that date, since the parties must have known that performance of the contract would become impossible unless the ship continued to exist. See also *Luxor (Eastbourne) Ltd v Cooper*[1941] AC 108 at 137, [1941] 1 All ER 33 at 52, HL; *Gloucestershire County Council v Richardson*[1969] 1 AC 480 at 503, [1968] 2 All ER 1181 at 1190, HL, per Lord Wilberforce; *Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board*[1973] 2 All ER 260 at 268, [1973] 1 WLR 601 at 609, HL, per Lord Pearson, and at 270 and 612 per Viscount Dilhorne. See further para 783 note 9 post.

5 See note 4 supra.

6 *The Moorcock* (1889) 14 PD 64 at 68, CA, per Bowen LJ.

7 It has often been said that a plea of such an implied term is likely to be the last resort of desperate counsel: *Shirlaw v Southern Foundries (1926) Ltd*[1939] 2 KB 206 at 227, [1939] 2 All ER 113 at 124, CA, per Mackinnon LJ (affd sub nom *Southern Foundries (1926) Ltd v Shirlaw*[1940] AC 701, [1940] 2 All ER 445, HL); *Curragh Investments Ltd v Cook*[1974] 3 All ER 658 at 662, [1974] 1 WLR 1559 at 1564 per Megarry J.

8 See paras 785, 789 post.

9 See para 784 post.

10 See *The Moorcock* (1889) 14 PD 64, CA; *Hamlyn & Co v Wood & Co*[1891] 2 QB 488, CA; *The Bearn*[1906] P 48, CA; *McClelland v Northern Ireland General Health Services Board*[1957] 2 All ER 129, [1957] 1 WLR 594, HL (distinguished in *Jonescu v Royal Free Hospital Board of Governors* (1965) 109 Sol Jo 534, CA). For some possible guidelines in determining whether or not a term is to be implied see para 783 post.

11 'For a term to be implied the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract': *Hospital Products Ltd v United States Surgical Corp*n [1985] LRC (Comm) 411 at 429-430, Aust HC, per Gibbs CJ.

12 'Prima facie, that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!': *Shirlaw v Southern Foundries (1926) Ltd*[1939] 2 KB 206 at 227, [1939] 2 All ER 113 at 124, CA, per Mackinnon LJ (affd sub nom *Southern Foundries (1926) Ltd v Shirlaw*[1940] AC 701, [1940] 2 All ER 445, HL).

13 See eg *Mersey Docks and Harbour Co v North West Water Authority* [1979] LS Gaz R 101; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA*[1988] 3 All ER 902, [1989] 1 WLR 255; *Nutting v Baldwin*[1995] 2 All ER 321, [1994] 1 WLR 201; *Bournemouth and Boscombe Athletic Football Club Co Ltd v Manchester United Football Club Ltd*(1980) Times, 22 May, CA.

14 'If it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear': *Reigate v Union Manufacturing Co (Ramsbottom)*[1918] 1 KB 592 at 605, CA, per Scrutton LJ (cited with approval by Lord Pearson in *Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board*[1973] 2 All ER 260, [1973] 1 WLR 601, HL).

15 See eg *Brewer v Westminster Bank Ltd*[1952] 2 All ER 650; *Orman v Saviile Sportswear Ltd*[1960] 3 All ER 105, [1960] 1 WLR 1055; *Bronester Ltd v Priddle*[1961] 3 All ER 471, [1961] 1 WLR 1294, CA.

16 Perhaps because they amount to the same thing: see *Marcan Shipping (London) Ltd v Polish Steamship Co, The Manifest Lipkowsky* [1989] 2 Lloyd's Rep 138 at 143-144, CA, per Bingham LJ; *Ben Shipping Co (Pte) Ltd v An Bord Bainne, The C Joyce*[1986] 2 All ER 177 at 182, [1986] 2 Lloyd's Rep 285 at 288-289; *Barrett v Lounova (1982) Ltd*[1990] 1 QB 348 at 355, [1989] 1 All ER 351 at 354-355, CA; *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G Tsavlis Maritime Co & Sons, The Choko Star* [1990] 1 Lloyd's Rep 516 at 524, 526, CA; *Wardens, etc, of Mercers v New Hampshire Insurance Co* as reported in [1992] 2 Lloyd's Rep 365 at 370, CA; *Ashmore v Corp'n of Lloyd's (No 2)* [1992] 2 Lloyd's Rep 620 at 626.

17 It could not then be said that an implied term would give effect to the intention of the parties: see note 4 supra. See *Luxor (Eastbourne) Ltd (in liquidation) v Cooper*[1941] AC 108, [1941] 1 All ER 33, HL; *Attica Sea Carriers Corp'n v Ferrostaal Poseidon Bulk Rederei GmbH, The Puerto Buitrago* [1976] 1 Lloyd's Rep 250, CA; *Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd*[1980] 1 All ER 488, [1980] 1 WLR 425. The

knowledge of the facts upon which the inference is made by both parties is thus a relevant factor: *KC Sethia (1944) Ltd v Partabmull Rameshwar*[1950] 1 All ER 51, CA (affd [1951] 2 All ER 352n, HL); *Spring v National Amalgamated Stevedores and Dockers Society*[1956] 2 All ER 221, [1956] 1 WLR 585; *Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SpA*[1960] 2 QB 115, [1960] 2 All ER 55, CA; *Jamil Line for Trading and Shipping Ltd v Atlanta Handelsgesellschaft Harder & Co, The Marko Polo* [1982] 1 Lloyd's Rep 481.

18 See eg *Gardner v Coutts & Co*[1967] 3 All ER 1064, [1968] 1 WLR 173; but see *Mosvolds Rederi A/S v Food Corp of India* [1986] 2 Lloyd's Rep 68. The two tests will usually produce the same result because normally the parties will act as reasonable persons.

19 See para 781 ante. Perhaps it is this that led the House of Lords to imply a term into the lease of a ninth floor maisonette in a tower block that the council landlord should take reasonable care to keep the common parts of the block (including lifts) in a reasonable state of repair (*Liverpool City Council v Irwin*[1977] AC 239, [1975] 2 All ER 39, HL): the term could not be implied in fact, because the officious bystander test was not satisfied (see *Liverpool City Council v Irwin* supra at 258 and at 47 per Lord Cross and at 266 and 55 per Lord Edmund-Davies); but it was necessary to import such a term on grounds of public policy (see *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*[1986] AC 80, [1985] 2 All ER 947, PC). A term will not be implied simply on grounds of public policy (*Johnstone v Bloomsbury Health Authority*[1992] QB 333, [1991] 2 All ER 293, CA); nor will a term be implied where this is contrary to public policy and ultra vires the body making it (*William Cory & Son Ltd v City of London Corp*[1951] 2 KB 476, [1951] 2 All ER 85, CA). Unfortunately, in subsequent cases relying on this decision, the courts have not made it clear whether the implication is a matter of fact or law: see *Wettern Electric Ltd v Welsh Development Agency*[1983] QB 796, [1983] 2 All ER 629; *Sim v Rotherham Metropolitan Borough Council*[1987] Ch 216, [1986] 3 All ER 387; *King v South Northamptonshire District Council* [1992] 06 EG 152, CA; *Scully v Southern Health and Social Services Board*[1992] 1 AC 294 at 306, [1991] 4 All ER 563 at 571, HL; *Spring v Guardian Assurance*[1995] 2 AC 296, [1994] 3 All ER 129, HL (judges prepared to decide on grounds of an implied term, but no reasoning). Perhaps the good faith principle may help here: see para 613 ante.

## UPDATE

### 782 Giving efficacy to contract

NOTE 4--See also *Lymington Marina Ltd v Macnamara*[2007] EWCA Civ 151, [2007] 2 All ER (Comm) 825.

NOTE 10--See *Ministry of Defence v Country and Metropolitan Homes (Rissington) Ltd*[2002] EWHC 2113 (Ch), (2002) Times, 7 November (coverage payment clause not needing implied term).

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### 783. Determining whether term is to be implied.

If there is any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced, the document should be looked at and all the surrounding circumstances considered; and, if the document is silent<sup>1</sup> and there is no bad faith on the part of the alleged promisor<sup>2</sup>, the court 'ought to be extremely careful' how it implies a term<sup>3</sup>. It is not enough to say that it would be reasonable to make a particular implication<sup>4</sup>; nor that it would make the carrying out of the contract more convenient<sup>5</sup>; nor that it is consistent with the express provisions of the contract or with the intentions of the parties as gathered from those provisions<sup>6</sup>; nor will a term be implied where a contract is effective without the proposed term<sup>7</sup>.

Whether a term will be implied is a question of law for the court<sup>8</sup>. A term will not be implied so as to contradict any express term<sup>9</sup>; and, in fact, a term ought not to be implied unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation<sup>10</sup>. The court has no discretion to create a new contract<sup>11</sup>. Where a contract contains an express obligation by a party to the contract, it is for that party to show that there is some implied term which qualifies the obligation<sup>12</sup>.

1 The mere fact of a silence consistent with such an implied provision is not sufficient for its implication (see the text to note 6 *infra*); but an express inconsistent provision is fatal to any such implication (see the text to note 9 *infra*).

2 Compare the good faith doctrine: see para 613 *ante*.

3 See *Re Railway and Electric Appliances Co* (1888) 38 ChD 597 at 608 per Kay J (on sale of patent to a company, no implied covenant by company to keep the patent alive); *Douglas v Baynes* [1908] AC 477, PC; *Easton v Hitchcock* [1912] 1 KB 535 (no implied warranty by private inquiry agent as to secrecy of employees after leaving his service); *Re Nott and Cardiff Corpn* [1918] 2 KB 146 at 168, CA, per Pickford LJ (revsd on appeal sub nom *Brodie v Cardiff Corpn* [1919] AC 337, HL (but not on this point)); *L French & Co v Leeston Shipping Co* [1922] 1 AC 451 at 454, HL, per Lord Buckmaster; *Howard Houlder & Partners Ltd v Manx Isles Steamship Co* [1923] 1 KB 110; *WH Gaze & Sons Ltd v Port Talbot Corpn* (1929) 93 JP 89. For instances of where such implication was rejected see para 789 *post*. As to deeds see *Throckmerton v Tracy* (1555) 1 Plowd 145; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 165, 178.

4 *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592; see also *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166, [1951] 2 All ER 617, HL; *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 at 174, [1958] 1 All ER 725 at 744, HL, per Lord Reid; *Causton v Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453, [1974] 1 WLR 162, CA. See further paras 782 note 10 *ante*, 784 note 2 *post*.

5 *Russell v Duke of Norfolk* [1949] 1 All ER 109, CA; *Ben Shipping Co (Pte) Ltd v An Bord Bainne, The C Joyce* [1986] 2 All ER 177, [1986] 2 Lloyd's Rep 285.

6 *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 422, HL, per Lord Parker.

7 *Consolidated Goldfields of South Africa Ltd v E Spiegel & Co* (1909) 25 TLR 275 at 277 per Bray J (in sale of shares for special settlement, no implied condition that the special settlement should take place within a reasonable time); *Re Nott and Cardiff Corpn* [1918] 2 KB 146 at 168, CA (on appeal sub nom *Brodie v Cardiff Corpn* [1919] AC 337, HL); *L French & Co v Leeston Shipping Co* [1922] 1 AC 451, HL; *Tadd v Eastwood* [1985] ICR 132, CA. There is no presumption that, whenever something is done by the grantor which has the effect of preventing or reducing the profits which the grantee reasonably expects to obtain from the grant, the grantee has a cause of action; each contract must be looked at and considered by itself: *Dare v Bognor UDC* (1912) 76 JP 425, CA. Contra where there is actual prevention of performance: see para 786 *post*.



8 See para 778 note 2 ante.

9 *General Publicity Services Ltd v Best's Brewery Co Ltd* [1951] 2 TLR 875, CA; *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA; *Lynch v Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303, CA. But see *Baldry v Marshall* [1925] 1 KB 260, CA; and see para 786 note 2 post. For a similar principle in relation to implied contracts see para 618 note 5 ante.

10 *Midland Rly Co v London and North Western Rly Co* (1866) 15 LT 264; *Hamlyn & Co v Wood & Co* [1891] 2 QB 488 at 491, CA, per Lord Esher MR, and at 494 per Kay LJ; *Douglas v Baynes* [1908] AC 477 at 481-482, PC. See also *Re Anglo-Russian Merchant Traders and John Batt & Co (London)* [1917] 2 KB 679, CA; *Re Rubel Bronze and Metal Co and Vos* [1918] 1 KB 315; *Harrison v Walker* [1919] 2 KB 453; *Caraman Rowley and May v Aperghis* (1923) 40 TLR 124; *Broome v Pardess Co-operative Society of Orange Growers* [1940] 1 All ER 603, CA; *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51, CA (affd sub nom *Partabmull Rameshwar v KC Sethia (1944) Ltd* [1951] 2 All ER 352n, HL); *Bellshill and Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd* [1960] AC 832, [1960] 1 All ER 637, HL; *Trollope and Colls Ltd v North Western Metropolitan Regional Hospital Board* [1973] 2 All ER 260, [1973] 1 WLR 601, HL; *Essoldo Ltd v Ladbroke Group Ltd* (1976) 121 Sol Jo 83.

11 See para 784 post. As to deeds see *Mills v Dunham* [1891] 1 Ch 576 at 580, CA, per Chitty J; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 177.

12 *General Publicity Services Ltd v Best's Brewery Co Ltd* [1951] 2 TLR 875, CA (free supply of tariff booklets to hotel in consideration of undertaking by hotel proprietor to circulate or display them in course of business for a stated period, with option to the suppliers to extend the agreement for a further specified period; no implied term that obligation of hotel proprietors should come to an end if business sold). Cf *General Publicity Services Ltd v Teign Hotel Ltd* (1951) 95 Sol Jo 788, CA.

## UPDATE

### 783 Determining whether term is to be implied

NOTE 10--See also *Anders & Kern UK Ltd (t/a Anders & Kern Presentation Systems) v CGU Insurance plc (t/a Norwich Union Insurance)* [2007] EWCA Civ 1481, [2008] 2 All ER (Comm) 1185 (term not implied as would extend insurer's risk significantly beyond clear limit of policy); *Durham Tees Valley Airport Ltd v BMI Baby Ltd* [2009] EWHC 852 (Ch), [2009] All ER (D) 233 (Apr) (not legally permissible to imply term as it was insufficiently precise).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(ii) Other Terms Implied by the Courts/784. No discretion to create new contract.

#### **784. No discretion to create new contract.**

Where, though there has been no frustrating event putting an end to the contract<sup>1</sup>, a turn of events has occurred which was not contemplated by the parties to the contract, the court is not thereby entitled to qualify the contract for the purpose of doing what seems to it just and reasonable<sup>2</sup>; what is required is that the implication must be necessary to give business efficacy to the contract<sup>3</sup>. If, however, a consideration of the terms of the contract in the light of the circumstances existing when it was made shows that the parties never intended to be bound in a fundamentally different situation which has unexpectedly arisen, the contract ceases to bind at that point, not because the court exercises any power of qualifying the contract, but because the contract on its true construction does not apply to the situation which has arisen<sup>4</sup>.

It would seem that this test of creation of a new contract has no application to terms implied as a matter of law<sup>5</sup>; nor where the term arises from the nature of the relationship<sup>6</sup>. Perhaps it is really confined to unique situations<sup>7</sup>.

1 Frustration is considered at para 897 et seq post. It is sometimes said that the whole doctrine of frustration is based on an implied term: see para 897 note 5 post.

2 *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166, [1951] 2 All ER 617, HL (agreement to remain in force during continuance in force of emergency order; order continued temporarily in force by fresh legislation after expiry of Act under which originally made); *Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, [1973] 1 WLR 601, HL (building contract providing for completion of phase III by a specified date but that the date for the completion of phase I might be extended in certain events. The House of Lords refused to imply a term that the date for the completion of phase III should be extended by an equal period). Nevertheless, the terms implied must be reasonable: see para 787 post.

3 See para 782 ante.

4 *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166 at 184-185, [1951] 2 All ER 617 at 624-625, HL (explaining *Bush v Whitehaven Town and Harbour Trustees* (1888) 2 Hudson's BC (4th Edn) 122, 130, CA); *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632, [1950] 1 All ER 208, CA; see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 35. Cf *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, [1956] 2 All ER 145, HL (criticising *Bush v Whitehaven Town and Harbour Trustees* supra).

5 Perhaps because in that case the implication is not discretionary: see para 781 ante.

6 *Liverpool City Council v Irwin* [1977] AC 239, [1975] 2 All ER 39, HL (discussed in para 782 note 19 ante); *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817, [1976] 1 WLR 346, CA (see para 781 note 37 ante).

7 As in *The Moorcock* (1889) 14 PD 64, CA (see para 782 ante).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(ii) Other Terms Implied by the Courts/785. Examples of implied terms.

### **785. Examples of implied terms.**

The principle that a term will be implied into a contract when it is necessary to give it business efficacy<sup>1</sup> is often applied, notwithstanding that the court has no discretion to create a new contract<sup>2</sup>. In the leading case, a term was implied into a contract for the use of a wharf that it was safe for a ship to lie at the wharf<sup>3</sup>. It has since been implied that one party will not by his wrongful acts be permitted to prevent another from performing the contract made between them<sup>4</sup>; and the courts have frequently been called upon to imply reasonable terms into a contract<sup>5</sup>, with respect to export and import licences<sup>6</sup> and as to contractual licences<sup>7</sup>. Where a contract requires an act to be done in a foreign country, it is generally an implied term of the continuing validity of the contract that the act will not be illegal by the law of that country<sup>8</sup>. Moreover, it will be presumed that, where the consideration is regulated by a third party, neither would attempt to obtain an unfair advantage<sup>9</sup>; that a contract of compromise implies a mutual surrender of rights<sup>10</sup>; that a contracting party in breach may be under a duty to inform the other party of his breach<sup>11</sup>; that the parties did not intend that one of them should, as against the other, be intended to take advantage of his own wrong<sup>12</sup>; and in some circumstances, that there is an implied obligation of good faith<sup>13</sup>.

Other examples where the courts found terms implied in fact may be classified as follows<sup>14</sup>:

- 105 (1) architects and engineers<sup>15</sup>;
- 106 (2) agency<sup>16</sup>;
- 107 (3) arbitration<sup>17</sup>;
- 108 (4) bailment<sup>18</sup>;
- 109 (5) building<sup>19</sup>;
- 110 (6) carriage of goods<sup>20</sup>;
- 111 (7) charterparty<sup>21</sup>;
- 112 (8) company<sup>22</sup>;
- 113 (9) employment<sup>23</sup>;
- 114 (10) finance<sup>24</sup>;
- 115 (11) guarantee<sup>25</sup>;
- 116 (12) joint ventures<sup>26</sup>;
- 117 (13) miscellaneous<sup>27</sup>;
- 118 (14) real property<sup>28</sup>;
- 119 (15) sale of goods<sup>29</sup>; and
- 120 (16) supply of other services<sup>30</sup>.

1 See para 782 ante.

2 See para 784 ante.

3 *The Moorcock* (1889) 14 PD 64, CA.

4 See para 786 post.

5 See para 787 post.

6 See para 788 post.

7 See para 981 post.

8 See para 902 post.

- 9 *Essoldo Ltd v Ladbroke Group Ltd* (1976) 121 Sol Jo 83.
- 10 *Evenoon Ltd v Jackel & Co Ltd* 1982 SLT 83, IH.
- 11 *Stag Line Ltd v Tyne Shiprepair Group Ltd, The Zinnia* [1984] 2 Lloyd's Rep 211.
- 12 *Alghussein Establishment v Eton College* [1991] 1 All ER 267, [1988] 1 WLR 587, HL; and see para 786 post.
- 13 Eg conditions as to approval (see para 964 note 2 post); *Cobelfret NV v Cyclades Shipping Co Ltd, The Linardos* [1994] 1 Lloyd's Rep 28 (giving contractual notices).
- 14 Compare the cases where the courts have refused implication: see para 789 post.
- 15 In a contract by an architect to prepare plans for a site, there may be an implied licence to use those plans for all purposes connected with the buildings on that site (*Blair v Osborne and Tomkins* [1971] 2 QB 78, [1971] 1 All ER 468, CA; but see para 789 note 14 post) and in a contract by consultant engineers to design a building for a particular purpose, there may be an implied term that the design should be fit for that purpose (*Greaves & Co (Contractors Ltd) v Baynham Meikle and Partners* [1975] 3 All ER 99, [1975] 1 WLR 1095, CA).
- 16 Where one person employs another on commission, if he employs him merely as an agent, there is no implied promise to provide him with the means of earning his commission; but it is otherwise where the contract is one of service: *Bauman v Hulton Press Ltd* [1952] 2 All ER 1121; *Moon v Camberwell Corpn* (1903) 89 LT 595, CA; *Northey v Trevillion* (1902) 18 TLR 648; see also *Turner v Goldsmith* [1891] 1 QB 544, CA; *Rhodes v Forwood* (1876) 1 App Cas 256, HL; *Devonald v Rosser & Sons* [1906] 2 KB 728; *Warren & Co v Agdeshman* (1922) 38 TLR 588; and AGENCY vol 1 (2008) PARAS 101, 183. Where an agent has received payments on account of commission, he may be liable under an implied term of the contract of agency to repay at the termination of the agency an excess of payments over commission earned: *Rivoli Hats Ltd v Gooch* [1953] 2 All ER 823, [1953] 1 WLR 1190 (not following *Clayton Newbury Ltd v Findlay* [1953] 2 All ER 826n); *Bronester Ltd v Priddle* [1961] 3 All ER 471, [1961] 1 WLR 1294, CA. Where an agent had made the introduction necessary to earn his commission, it was implied that his principal would not commit a breach of contract so as to deprive the agent of his commission: *Alpha Trading Ltd v Dunshaw-Patten Ltd* [1981] QB 290, [1981] 1 All ER 482, CA.
- 17 There has been held to be an implied term in an arbitration agreement, that the arbitration award should be in such a form that it would be capable of being enforced as a judgment under the relevant statute: *Margulies Bros Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 All ER 777, [1958] 1 WLR 398; *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1974] QB 292, [1973] 3 All ER 498, CA. See also ARBITRATION vol 2 (2008) PARA 1274.
- 18 In a contract of bailment the purpose of which was the use of the goods by the bailee, there was authority to do in relation to the goods all things reasonably incidental to their use: *Tappenden v Artus* [1964] 2 QB 185, [1963] 3 All ER 213, CA. In an oral contract made between two parties both of whom were hirers of plant, there was an implied term that the usual standard-form conditions of hire applied (*British Crane Hire Corpn Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA; and see para 780 ante) and, where the contract did not fix the date of performance, it was implied that the work was to begin and end within a reasonable time (*Aries Powerplant Ltd v ECE Systems Ltd* (1996) 45 ConLR 111).
- 19 In a building contract, where work commenced long before the contract was made, there was an implied term that the agreement would operate retrospectively (*Trollope and Colls Ltd and Holland and Hannen and Cubitts Ltd v Atomic Power Constructions Ltd* [1962] 3 All ER 1035, [1963] 1 WLR 333) and that the ground conditions would comply with the information given (*Bacal Construction (Midlands) Ltd v Northampton Development Corpn* [1976] 1 EGLR 127, CA); and also to pay interest on sums due (*FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 Build LR 1, CA).
- 20 In a contract for the shipment of tractors, there was an implied term that the tractors would be carefully loaded: *A Hamson & Son (London) Ltd v S Martin Johnson & Co Ltd* [1953] 1 Lloyd's Rep 553.
- 21 There may be an implied term as to the measurement of cargo at the port of loading (*Jos Merryweather & Co Ltd v Wm Pearson & Co* [1914] 3 KB 587; and see further CARRIAGE AND CARRIERS vol 7 (2008) PARA 598) and by a charterer, an indemnity as to the loss caused by the direction of the ship to Iraq (*Triad Shipping Co v Stellar Chartering and Brokerage Inc, The Island Archon* [1995] 1 All ER 595, [1994] 2 Lloyd's, CA).
- 22 In a contract for the employment of a director, there may be an implied term that the articles of the company will not be altered and then acted upon so as to terminate his contract of service: *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, [1940] 2 All ER 445, HL; and see further COMPANIES vol 14 (2009) PARAS 235, 517.

23 There have been held to be implied terms: (1) by an employee (a) that he will observe good faith towards his employer (*Robb v Green* [1895] 2 QB 315, CA); (b) that he will not divulge information obtained in the course of his employment (*Kirchner & Co v Gruban* [1909] 1 Ch 413); (c) that he may be directed by the employer to work at any place within reasonable daily reach (*Courtaulds Northern Spinning Ltd v Sibson* [1988] ICR 451, CA); (2) by an employer (a) that the employee will not be required to do any unlawful act (*Gregory v Ford* [1951] 1 All ER 121 (insurance of lorry against third-party risks; implied term of contract of employment that employers would insure)); (b) that the employer will not so conduct his business in a manner likely to damage the relationship of confidence and trust between employer and employee (*Malik v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20, [1997] 3 All ER 1, HL); (c) that the employer will take reasonable care in the preparation of references (*Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL). Additionally, some terms of collective agreements may be impliedly incorporated into individual contracts of employment: see para 752 note 9 ante.

24 In an irrevocable credit, there was found an implied term to honour drafts properly presented under the letter of credit (*Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, [1967] 2 All ER 1092) and in a sale of travellers' cheques an implied obligation to refund stolen cheques (*El Awadi v Bank of Credit and Commerce International SA* [1990] 1 QB 606, [1989] 1 All ER 242).

25 In a guarantee on a sale of plant, there may be an implied condition that it existed: *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255.

26 There is an implied term that each party assumes joint and several liability for acts done by the others as part of the venture (*Geisler and Fraser v Shields and Shields* [1983] 4 WWR 573, BC, Can) and that each would play its part in the venture (*Comet Group plc v British Sky Broadcasting Ltd* (1991) Times, 26 April).

27 In a contract of compromise between a plaintiff and second defendant, there was found an implied promise that the first defendant should not thereby be discharged (*Gardiner v Moore* [1969] 1 QB 55, [1966] 1 All ER 365); in a father's contract to pay such of his child's expenses as should be approved by him, an implied promise that such consent should not be unreasonably withheld (*Addison v Brown* as reported in [1954] 1 WLR 779 at 786); there has also been held to be an implied promise that a television company would not make use of an idea without employing the actresses who put it forward (*Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101).

28 In an option to renew a lease at a rent to be fixed by arbitration, there was an implied term that the parties would do all that was reasonably necessary to procure the appointment of an arbitrator: *Booker Industries Pty Ltd v Wilson Parking (QLD) Pty Ltd* (1982) 43 ALR 68, Aust HC. As to rent review clauses see para 675 notes 12-16 ante. In a contract of first refusal on the sale of property, there was an implied term that the property owner would not give the property to any third party (*Gardner v Coutts* [1967] 3 All ER 1064, [1968] 1 WLR 173); in a lease of a flat which provided that the landlord could recover maintenance costs from the tenant, there was an implied term that the contributions recoverable would extend only to fair and reasonable expenditure on maintenance (*Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581, CA); in a rent review clause at 'such rent as shall be agreed', there was an implied term that that should be a fair market rent (*Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522, CA; and see para 675 note 16 ante); and in a lease containing a defective rent review clause, there was an implied term that in default of agreement the original yearly rent would continue to be payable (*King v King* (1980) 41 P & CR 311; and see para 675 note 15 ante). As to rent review see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 292 et seq.

29 In a contract providing that, if there was delay, the buyer could elect whether to continue the contract 'under conditions mutually agreed', there was an implied term that a price increase might be one of the conditions: *Harland and Wolff Ltd v Lakeport Navigation Co Panama SA* [1974] 1 Lloyd's Rep 301.

30 There was an implied term (1) in a contract for a Turkish bath, that the couches for reclining on were free from vermin (*Silverman v Imperial London Hotels Ltd* (1927) 137 LT 57); (2) in a contract to print bank notes, not to use the plates for any unauthorised purpose (*Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, HL); (3) in a contract for the laying of a carpet, that it should be done in a proper and workmanlike manner (*Kimber v William Willett Ltd* [1947] KB 570, [1947] 1 All ER 361, CA); (4) in a contract to act as personal manager to entertainers, that the manager do nothing which he could have foreseen would destroy the entertainers' trust in him (*Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 729-731, [1968] 3 All ER 513 at 526-528, CA, per Winn LJ; contra at 725-726 and at 524 per Salmon LJ); (5) in a contract between a driving school and its customer, that any car provided under the contract would be covered by insurance (*British School of Motoring Ltd v Simms* [1971] 1 All ER 317); (6) in a contract to repair a car, that the repairs would be carried out only if economic (*Cannon v Miles (t/a Phoenix Motors)* [1974] 2 Lloyd's Rep 129, CA); (7) in a contract by which a cricketer made his services available to a cricket promoter, that the promoter would arrange a cricket tour (*Greig v Insole, World Series Cricket Pty Ltd v Insole* [1978] 3 All ER 449, [1978] 1 WLR 302). A stockbroker impliedly promised the genuineness of the transfer documents he submitted (*Yeung Kai Yung v Hong Kong and Shanghai Banking Corp* [1981] AC 787, [1980] 2 All ER 599, PC); a surgeon that a medical operation would be carried out with reasonable care (*Eyre v Measday* [1986] 1 All ER 488, CA). There

was also an implied term that an advertising contract should be determinable on reasonable notice (*Express Newspapers plc v Silverstone Circuits Ltd* [1989] Abr para 359, CA); and that services promised by a holiday tour operator would be carried out with reasonable skill and care (*Wong Mee Wan v Kwan Kin Travel Services Ltd* [1995] 4 All ER 745, [1996] 1 WLR 38, PC).

## UPDATE

### 785 Examples of implied terms

NOTE 14--See *Stabilad Ltd v Stephens & Carter Ltd (No 2)* [1999] 2 All ER (Comm) 651, CA (implied term that there was no satisfaction of a condition precedent to an agreement until such satisfaction had been communicated).

NOTE 16--See also *Glasgow West Housing Association Ltd v Siddique* 1998 SLT 1081, First Div (no implied term as to standard of work where contract conferred absolute discretion on agent).

NOTE 21--See also *Galaxy Energy International Ltd v Bayoil SA* [2001] 1 All ER (Comm), CA (implied term in charterparty that party would use due diligence to recover demurrage from third party).

NOTE 27--An offer to compromise proceedings carries an implied term that it will not be available for acceptance after the hearing has ended and the court has reserved judgment: *Hawley v Luminar Leisure plc* [2006] EWCA Civ 30, (2006) Independent, 7 February. Where designs are supplied under a contract, there is an implied obligation to carry out the design work with reasonable skill and care and this involves a duty to use reasonable care not to include material knowingly copied from a third party: *Antiquesportfolio.com plc v Rodney Fitch and Co Ltd* [2001] FSR 345. See also *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151, [2007] 2 All ER (Comm) 825 (right to grant sub-licence of marina berth subject to licensor's approval; for licensee to obtain the proper benefit of this power, a term had to be implied that licensor would exercise power to withhold approval in good faith).

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## 786. Prevention of performance.

In general<sup>1</sup>, a term is necessarily implied in any contract (provided the other terms do not repel the implication<sup>2</sup>) that neither party shall prevent the other from performing it, and that a party so preventing the other is guilty of a breach<sup>3</sup>. Thus, if an agreement can operate only during the continuance of a certain state of circumstances existing at the time when the contract is made, the parties will usually impliedly promise not to do anything of their own initiative<sup>4</sup> to put an end to those circumstances<sup>5</sup>; and, if the contract is made subject to a condition precedent<sup>6</sup>, the contract will generally be construed as imposing an obligation on the parties to do nothing to prevent the fulfilment of that condition<sup>7</sup>. Moreover, the court will readily imply a promise on the part of each party to do all that is necessary to secure the performance of the contract<sup>8</sup>, except where such an implication would fetter the future legislative discretion of one party<sup>9</sup>. Thus, where a contract of sale provides for the supply of an already-existing certificate of fitness in relation to the goods sold, there may be an implied warranty that the certificate is uninfluenced and independent<sup>10</sup>; where the employer under a building contract is responsible for nominating a sub-contractor, the employer is not entitled to damages for delayed completion in so far as the employer's acts or omissions have delayed that completion<sup>11</sup>; and in an arbitration there is a mutual obligation by each party to the other to avoid delay<sup>12</sup>.

Except possibly in the rare case of a wrongful act independent of the contract, for an act which prevents or obstructs the performance of a condition by the other party to a contract to be actionable it must itself be such an act as to constitute a breach of an express or implied term of the contract and should be so pleaded<sup>13</sup>.

1 'There can be no breach if the term in question is illegal, contrary to public policy, or (in the case of a corporation) ultra vires the contracting party': *William Cory & Son Ltd v London Corpn* [1951] 2 KB 476 at 484, [1951] 2 All ER 85 at 88, CA, per Lord Asquith. As to these exceptions see further para 836 et seq post; and COMPANIES; CORPORATIONS. As to the modification of the ultra vires doctrine in favour of a person dealing with a company in good faith see COMPANIES vol 14 (2009) paras 256, 263-265.

2 *Aspdin v Austin* (1844) 5 QB 671; *European and Australian Royal Mail Co Ltd v Royal Mail Steam Packet Co* (1861) 30 LJCP 247; *Rhodes v Forwood* (1876) 1 App Cas 256, HL; *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, CA; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL, *William Cory & Son Ltd v London Corpn* [1951] 2 KB 476, [1951] 2 All ER 85, CA. See generally para 783 note 9 ante.

3 *William Cory & Son Ltd v London Corpn* [1951] 2 KB 476 at 484, [1951] 2 All ER 85 at 88, CA, obiter per Lord Asquith. See also *Sailing Ship Blairmore Co Ltd v Macredie* [1898] AC 593, HL; *Barque Quilpue Ltd v Brown* [1904] 2 KB 264, CA.

4 This would amount to self-induced frustration: see para 899 post.

5 *Stirling v Maitland* (1864) 5 B & S 840 at 852 per Cockburn CJ (cited by Lord Hatherley in *Rhodes v Forwood* (1876) 1 App Cas 256 at 272, HL); *Turner v Goldsmith* [1891] 1 QB 544, CA; *Ogdens Ltd v Nelson* [1905] AC 109, HL; *Warren & Co v Agdeshman* (1922) 38 TLR 588; *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451, HL; *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, [1940] 2 All ER 445, HL; *A Hamson & Son (London) Ltd v S Martin Johnson & Co Ltd* [1953] 1 Lloyd's Rep 553; *Shindler v Northern Raincoat Co Ltd* [1960] 2 All ER 239, [1960] 1 WLR 1038; *Bournemouth and Boscombe Athletic Football Club Co Ltd v Manchester United Football Club Ltd* [1980] Abr para 486, CA.

6 As to non-performance of a condition precedent as a bar to enforcement see para 961 et seq post.

7 *Inchbald v Western Neilgherry Coffee, Tea and Cinchona Plantation Co Ltd* (1864) 17 CBNS 733; *Mackay v Dick* (1881) 6 App Cas 251, HL; *Hickman & Co v Roberts* [1913] AC 229, HL; *George Trollope & Sons v Martyn Bros* [1934] 2 KB 436, CA; *Schindler v Pigault* (1975) 30 P & CR 328; *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598, CA; *Alpha Trading Ltd v Dunshaw-Patten Ltd* [1981] QB 290, [1981] 1 All ER

482, CA; *Merton London Borough Council v Stanley Hugh Leach Ltd* (1985) 32 BLR 51; *Thompson v ASDA-MFI Group plc* [1988] Ch 241, [1988] 2 All ER 722; *Jebco Properties Ltd v Mastforce Ltd* [1992] NPC 42; *Nissho Iwai Petroleum Co Inc v Cargill International SA* [1993] 1 Lloyd's Rep 80. Cf *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, [1953] 2 All ER 1330, CA.

8 *Mackay v Dick* (1881) 6 App Cas 251 at 263, HL, per Lord Blackburn; *Sprague v Booth* [1909] AC 576 at 580, PC, per Lord Dunedin; *Kleinert v Abosso Gold Mining Ltd* (1913) 58 Sol Jo 45, PC; *Harrison v Walker* [1919] 2 KB 453; *Colley v Overseas Exporters* [1921] 3 KB 302 at 309 per McCardie J; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 118, [1941] 1 All ER 33 at 39, HL, per Viscount Simon LC; *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] AC 588 at 608, [1956] 1 All ER 639 at 648, HL, per Viscount Simonds, and at 611 and 650 per Lord Somervell; *Comet Group plc v British Sky Broadcasting Ltd* [1991] CLY 540. See also para 788 note 8 post.

However, the degree of co-operation required of the parties is determined, not by what is reasonable, but by what is necessary: 'it is no doubt true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree -- to the extent that is necessary to make the contract workable': *Mona Oil Equipment and Supply Co Ltd v Rhodesia Rlys Ltd* [1949] 2 All ER 1014 at 1018 per Devlin J.

9 Eg a term cannot be implied in a contract entered into by a local authority that it will not make byelaws throwing an additional burden on the other party in performing the contract; and the making of such a byelaw does not entitle the other party to repudiate; if the making of such a byelaw renders performance commercially impracticable, the contract is frustrated: *William Cory & Son Ltd v London Corp'n* [1951] 2 KB 476, [1951] 2 All ER 85, CA.

10 *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136 at 153, [1954] 1 WLR 963 at 984 per Devlin J.

11 *Percy Bilton Ltd v Greater London Council* [1982] 2 All ER 623, [1982] 1 WLR 794, HL.

12 *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854, [1983] 1 All ER 34, HL.

13 *Mona Oil Equipment and Supply Co Ltd v Rhodesia Rlys Ltd* [1949] 2 All ER 1014 at 1016-1017 per Devlin J (citing *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 148, 149, [1941] 1 All ER 33 at 60, HL, per Lord Wright).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(ii) Other Terms Implied by the Courts/787. Reasonableness.

### 787. Reasonableness.

Reasonableness is at the very foundation of the principle that a term may be implied into a contract if necessary to give efficacy to it<sup>1</sup>, though terms are not to be implied merely because it would be reasonable to do so<sup>2</sup>: the touchstone is always the necessity and not merely the reasonableness<sup>3</sup>.

However, once the test of necessity is satisfied, the courts have frequently actually implied a provision as to reasonableness into contracts. In some cases, this has been done so as to cure an uncertainty<sup>4</sup> which would otherwise be fatal to the very existence of the contract, for instance by implying a term as to a reasonable price<sup>5</sup>, valuation<sup>6</sup> or sum<sup>7</sup>. But there are many other cases where the courts have implied a provision as to reasonableness: for instance as to the reasonable duration of a contract<sup>8</sup>; that a right under a contract will be exercised within a reasonable time<sup>9</sup>; that a duty under a contract will be exercised with reasonable care and skill<sup>10</sup>, and will be performed so as not to defeat the overall purpose of the contract<sup>11</sup>; that rent may be increased by giving reasonable notice<sup>12</sup>.

The notion of the implication of a reasonable price, valuation or sum covers a number of different situations:

- 121 (1) it is used to describe the implied term within an express contract which is silent as to price<sup>13</sup>;
- 122 (2) it may refer to an implied contract to pay a reasonable sum<sup>14</sup>. Such an implied contract cannot co-exist with an express one<sup>15</sup>; it may come about by way of a novation<sup>16</sup>; or, in the absence of any express contract, it may arise from the fact that requested goods have been delivered or the requested services rendered<sup>17</sup>;
- 123 (3) the obligation to pay a reasonable sum for goods delivered or services rendered may be imposed in restitution<sup>18</sup>.

Theoretically, the third case is easily distinguishable from the other two in that the obligation is there imposed in the absence of any contract<sup>19</sup>; but, in practice, it is frequently difficult to distinguish between the second and third cases<sup>20</sup>.

1 See para 782 note 5 ante.

2 'It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves': *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at 268, [1973] 1 WLR 601 at 609, HL, per Lord Pearson (held no implied term). This seems a better formulation than to say that all implied terms are subject to a requirement of 'necessity', as if suggesting a further test: *Ashmore v Corpn of Lloyd's (No 2)* [1992] 2 Lloyd's Rep 620 at 627; *Hughes v Greenwich London Borough Council* [1994] 1 AC 170 at 179, [1993] 4 All ER 577 at 585, HL, per Lord Lowry. See also *Russell v Duke of Norfolk* [1949] 1 All ER 109, CA; *British Movietonews v London and District Cinemas Ltd* [1952] AC 166, [1951] 2 All ER 617, HL; *Lupton v Potts* [1969] 3 All ER 1083, [1969] 1 WLR 1749; *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA; *Express Newspapers v Silverstone Circuits* [1989] CLY 422, CA.

3 *Liverpool City Council v Irwin* [1977] AC 239 at 266, [1976] 2 All ER 39 at 54, HL, per Lord Edmund-Davies. See also *Scally v Southern Health and Social Services Board (British Medical Association, third party)* [1992] 1 AC 294, [1991] 4 All ER 563, HL.

4 See eg para 674 ante. Lack of certainty may prevent the formation of an agreement: see para 672 ante.

5 *Foley v Classique Coaches Ltd* [1934] 2 KB 1, CA; and see the Sale of Goods Act 1979 s 8; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 56. As to the duty to pay see generally para 942 post; and as to the refusal to make such implication in the case of commencement of leases see para 789 text and note 22 post.

6 *Talbot v Talbot* [1968] Ch 1, [1967] 2 All ER 920, CA.

7 *Powell v Braun* [1954] 1 All ER 484, [1954] 1 WLR 401, CA.

8 See eg *Jonescu v Royal Free Hospital Board of Governors* (1965) 109 Sol Jo 534, CA (implied term that contract of service could be determined after reasonable notice); and see further para 979 post. Cf *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30, CA ('The lease shall contain such other covenants and conditions as shall be reasonably required by' the lessor).

9 See eg *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, [1968] 1 WLR 74, CA; *Charnock v Liverpool Corp* [1968] 3 All ER 473, [1968] 1 WLR 1498, CA; *Zeeland Navigation Co Ltd v Banque Worms, The Foresight Driller II* [1995] 1 Lloyd's Rep 251.

10 See eg *Adams v Richardson and Starling Ltd* [1969] 2 All ER 1221, [1969] 1 WLR 1645, CA; *The Cawood III* [1951] P 270; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555; *Schioler v Westminster Bank Ltd* [1970] 2 QB 719, [1970] 3 All ER 177; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210, [1972] 1 WLR 602; *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581, CA; *Comyn Ching & Co (London) Ltd v Oriental Tube Co Ltd* [1981] Com LR 67, CA; *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1995] 4 All ER 745, [1996] 1 WLR 38, PC; *Claude R Ogden & Co Pty Ltd v Reliance Fire Sprinkler Co Ltd* [1975] 1 Lloyd's Rep 52, Aust SC. But see *Bell v Travco Hotels Ltd* [1953] 1 QB 473, [1953] 1 All ER 638, CA.

11 See eg *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455 at 470, [1972] 2 All ER 949 at 962, CA; and see para 786 ante.

12 See eg *Greater London Council v Connolly* [1970] 2 QB 100, [1970] 1 All ER 870, CA.

13 See notes 5-7 supra.

14 *Zinman v Hechter* (1981) 130 DLR (3d) 183, Man CA; and see para 618 ante.

15 *Britain v Rossiter* (1879) 11 QBD 123, CA; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 [1941] 1 All ER 33, HL; *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099, CA; *John Meacock & Co v Abrahams* [1956] 3 All ER 660, [1956] 1 WLR 1463, CA. But as to the doctrine of substantial performance see para 924 post.

16 See eg *Bush v Whitehaven Town and Harbour Trustees* (1888) 52 JP 392, CA; *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632, [1950] 1 All ER 208, CA. As to novation see generally para 1036 et seq post.

17 See eg *Edmonds & Co Ltd v Fagin* [1939] 3 All ER 974. See further para 778 ante; RESTITUTION vol 40(1) (2007 Reissue) paras 123-126. Cf *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL.

18 See para 618 ante; RESTITUTION.

19 Or where any contract is unenforceable: *Mavor v Pyne* (1825) 3 Bing 285; *Gray v Hill* (1826) Ry & M 420; *Scarisbrick v Parkinson* (1869) 20 LT 175; *Pulbrook v Lawes* (1876) 1 QBD 284; *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551 at 556, [1950] 2 All ER 1099 at 1104, CA, per Denning LJ.

20 See eg *Scott v Pattison* [1923] 2 KB 723; *Anson v Anson* [1953] 1 QB 636, [1953] 1 All ER 867.

## UPDATE

### 787 Reasonableness

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(ii) Other Terms Implied by the Courts/788. Export and import licences.

### **788. Export and import licences.**

International contracts for the sale of goods are frequently subject to the restriction that a licence is required for the import or export of goods<sup>1</sup>. The parties may expressly provide who is to assume the responsibility of obtaining any necessary licence<sup>2</sup>; but, in the absence of any express term, there may be an implied term to this effect<sup>3</sup>.

Assuming that there is such an express or implied term<sup>4</sup>, it is a matter of construction<sup>5</sup> whether the party placed under the duty (1) promised to use his best endeavours to obtain a licence<sup>6</sup>; or (2) undertook absolutely that a licence would be obtained<sup>7</sup>. At all events, the parties will usually impliedly promise to co-operate with each other to the extent that is necessary to obtain a licence<sup>8</sup>.

1 As to the formation of international sales generally see paras 629 note 5, 684 ante.

2 For instance the duty to obtain an export licence will normally be expressly laid on the seller: see eg *Windschuegl Ltd v Pickering & Co Ltd* (1950) 84 Ll L Rep 89; and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 358, 363. As to express terms see generally para 770 ante.

3 See eg *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784, CA; and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 363.

4 If there is no such term, the contract is, or may become, impossible of performance: see para 908 post. Alternatively, the seller may be liable for non-delivery: see *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51, CA; affd sub nom *Partabmull Rameshwar v KC Sethia (1944) Ltd* [1951] 2 All ER 352n, HL.

5 There is no definite rule upon this matter: see eg *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784, CA (fob contract, obligation in the particular circumstances on the buyers); *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] AC 588, [1956] 1 All ER 639, HL (fas contract, obligation in the particular circumstances on the sellers); *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* [1957] 1 All ER 484, [1957] 1 WLR 273 (similar case, fob terms). As to the elements of the different types of international sale contracts see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 322 et seq.

6 See eg *Re Anglo-Russian Merchant Traders Ltd and John Batt & Co (London) Ltd* [1917] 2 KB 679, CA; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497, CA; *Société d'Avances Commerciales (London) Ltd v A Besse & Co (London) Ltd* [1952] 1 TLR 644; *Malik Co v Central European Trading Agency Ltd* [1974] 2 Lloyd's Rep 279; *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep 560.

7 See eg *Mitchell Cotts & Co (Middle East) Ltd v Hairco Ltd* [1943] 2 All ER 552, CA; *Peter Cassidy Seed Co Ltd v Osuustukkukauppa IL* [1957] 1 All ER 484, [1957] 1 WLR 273.

8 See eg *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] AC 588 at 608, [1956] 1 All ER 639 at 648, HL, per Viscount Simonds, and at 611 and 650 per Lord Somervell; *Kyprianou v Cyprus Textiles Ltd* [1958] 2 Lloyd's Rep 60, CA; and see generally para 786 note 8 ante. As to non-performance as a bar to enforcement see para 961 et seq post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(2) IMPLIED TERMS/(ii) Other Terms Implied by the Courts/789. Instances where implication rejected.

### **789. Instances where implication rejected.**

A term will not be implied on grounds that it would give efficacy to the contract<sup>1</sup> merely because it would have been reasonable for the parties to have included it<sup>2</sup>; and there has been a strong judicial warning given against the over-ready application of the principle to justify the implication of terms<sup>3</sup>. Thus, the courts have refused to imply a term that the parties will negotiate in good faith<sup>4</sup> and may not then allow a claim in tort instead<sup>5</sup>. Where there was an express reference to interest in prior negotiations, the courts have refused to imply a term that a party had agreed to forego interest<sup>6</sup>; they would not imply a term where there was no obvious gap in the express terms of the contract<sup>7</sup>; and they have held that there was no implied term that a party exercising a right of rescission must give the correct reason for so doing<sup>8</sup>.

The court has refused to imply terms in cases relating to<sup>9</sup>:

- 124 (1) architects and engineers<sup>10</sup>;
- 125 (2) agency<sup>11</sup>;
- 126 (3) arbitration<sup>12</sup>;
- 127 (4) bailment<sup>13</sup>;
- 128 (5) building<sup>14</sup>;
- 129 (6) carriage of goods<sup>15</sup>;
- 130 (7) charterparty<sup>16</sup>;
- 131 (8) company contracts<sup>17</sup>;
- 132 (9) employment<sup>18</sup>;
- 133 (10) finance<sup>19</sup>;
- 134 (11) miscellaneous<sup>20</sup>;
- 135 (12) other services<sup>21</sup>;
- 136 (13) real property<sup>22</sup>; and
- 137 (14) sale of goods<sup>23</sup>.

1 The principle is set out in para 782 ante.

2 See para 787 note 2 ante.

3 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227, [1939] 2 All ER 113 at 124, CA, per Mackinnon LJ; affd sub nom *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, [1940] 2 All ER 445, HL. See also *London Cemetery Co v Cundey* [1953] 2 All ER 257, [1953] 1 WLR 786.

4 See para 641 note 17 ante.

5 See para 610 ante.

6 *Yorkshire Electricity Board v Estonian Shipping Co, The Virtsu* [1982] 2 Lloyd's Rep 33, CA.

7 *Adams Holden & Pearson v Trent Regional Health Authority* (1989) 47 BLR 34, CA, where it was held that a just result could be reached by way of restitution (see para 618 ante; RESTITUTION).

8 *Wong v Benn* [1992] CLY 528, Mayor's and City of London County Court.

9 Compare those cases where the courts have implied terms: see para 785 ante.

10 In a contract to design and supervise the installation of equipment, there was no implied warranty that it would be safe: *Hawkins v Chrysler (UK) Ltd* [1986] BTLC 351, CA (the engineer had complied with the implied term that he exercise reasonable care and skill: see para 787 note 10 ante).

11 In a contract between an estate agent and a vendor, there was no implied term that the prospective purchaser should be able and willing to purchase: *Sheggia v Gradwell* [1963] 3 All ER 114, [1963] 1 WLR 1049, CA; and see further AGENCY vol 1 (2008) PARA 103. Cf *Blake & Co v Sohn* [1969] 3 All ER 123, [1969] 1 WLR 1412 (no implied term that a good title would be made out).

12 Into an agreement to arbitrate, it was not implied that the claimant would proceed without due delay: *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn* [1981] AC 909, [1981] 1 All ER 289, HL.

13 In a contract to carry mails for the Crown, there was no implied condition that the Crown would employ the contractor to carry any particular quantity of mails: *Churchward v R* (1865) LR 1 QB 173. In this case, the court may have thought that the performance of the disputed provisions of the contract were subject to the condition precedent that Parliament should grant the necessary funds. As to conditions precedent see para 670 ante. In some such cases, it may be found that the 'contractor' has merely made a standing offer to the Crown to enter into a unilateral contract. If so, it may be found that there has been no acceptance: see eg *R v Demers* [1900] AC 103, PC ('contract' to print certain public documents at a price, no implied promise that orders for work shall be given); or that the offer is divisible, and has been accepted pro tanto by the placing of orders. As to tenders see para 635 ante; and as to acceptance in the case of unilateral contracts see generally para 657 ante.

14 In an agreement to contribute towards the cost of building a theatre, there was no implied promise to build the theatre: *Morell v New London Discount Co Ltd* (1902) 18 TLR 507. (As to implied terms in building contracts see generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS). In a building contract, there was no implied warranty against interference by a third party with access to the site: *Porter v Tottenham UDC* [1915] 1 KB 776, CA. In a contract to design a building at a nominal fee for the purpose of obtaining planning permission, there was no implied term that the client was entitled to use the plan for the purpose of erecting a building: *Stovin-Bradford v Volpoint Properties Ltd* [1971] Ch 1007, [1971] 3 All ER 570, CA. It would be otherwise if the architect had charged the scale fee: see para 785 note 15 ante. In a building contract, there was no implied term that the time for completion of a phase of the work should be extended so as to take into account delays in the completion of an earlier phase of that contract: *Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, [1973] 1 WLR 601, HL. In a large building project, there was no implied term in sub-contracts to warn the main contractor of any defects in the works (*Southern Water Authority v Carey* [1985] 2 All ER 1077); and a court refused to imply a covenant that the building committee of a mutual covenant scheme should not unreasonably withhold permission to build (*Price v Bouch* [1986] 2 EGLR 179).

15 In a contract for carriage by sea, it was not implied that the master was authorised to contract on behalf of cargo-owners with third parties: *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G Tsaviris & Sons Maritime Co, The Choko Star* [1990] 1 Lloyd's Rep 516, CA.

16 In a charterparty, there was no implied warranty that the shipowners would use due diligence to obtain and would obtain any necessary government permission to load (*Compagnie Algerienne de Meunerie v Katana Societa Di Navifotone Marittima SpA* [1960] 2 QB 115, [1960] 2 All ER 55, CA; and see generally CARRIAGE AND CARRIERS); nor that, on premature re-delivery of the vessel, bunkers would be delivered to the shipowner (*Stellar Chartering & Brokerage Inc v Efibanca-Ente Finanziario Interbancario SpA, The Span Tera (No 2)* [1984] 1 WLR 27, [1984] 1 Lloyd's Rep 119, HL); nor in a voyage charterparty, that the charterers would indemnify the shipowner against claims by the cargo-owners (*Ben Shipping Co (Pte) Ltd v An Board Banne, The C Joyce* [1986] 2 All ER 177, 1986 2 Lloyd's Rep 285).

17 In a contract for the sale of shares in a company with part of the price to be paid when the company could utilise a credit, there was no implied term that the price was payable only if the utilisation of the credit increased the value of the shares (*Gottesmann v Navigation and Trading Co Ltd* [1953] 1 Lloyd's Rep 119; and as to transfers of shares see generally COMPANIES); nor was there an implied term in a debenture that a debenture-holder could appoint a receiver if his security was jeopardised (*Cryne v Barclays Bank plc* [1987] BCLC 548, CA).

18 The courts have refused to imply terms: (1) by an employee that he should accept an order to connive at the falsification of his employers' records (*Morrish v Henlys (Folkestone) Ltd* [1973] 2 All ER 137, NIRC. But see *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650, and cf *Reading v A-G* [1951] AC 507, [1951] 1 All ER 617, HL); (2) by an employer (a) that he would take reasonable care to ensure that his employee's effects were not stolen (*Deyong v Shenburn* [1946] KB 227, [1946] 1 All ER 226, CA; *Edwards v West Herts Group Hospital Management Committee* [1957] 1 All ER 541, [1957] 1 WLR 415, CA); (b) that he would indemnify the employee in respect of torts committed in the course of his employment (*Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL); (c) that wages were not to be paid during absence through illness (*Orman v Saville Sportswear Ltd* [1960] 3 All ER 105, [1960] 1 WLR 1055); (d) that the contract should be terminable on reasonable notice (*McClelland v Northern Ireland General Health Services Board* [1957] 2 All ER 129, [1957] 1 WLR 594, HL); (e) that advances of commission yet to be earned should be retained after

termination of the contract (*Bronester Ltd v Priddle* [1961] 3 All ER 471, [1961] 1 WLR 1294, CA. Cf *O'Brien v Associated Fire Alarms Ltd* [1969] 1 All ER 93, [1968] 1 WLR 1916, CA (no implied term that employees could be sent anywhere)); (f) that he would insure his employee against accidental injury whilst abroad (*Reid v Rush & Tomkins Group plc* [1989] 3 All ER 228, [1990] 1 WLR 212, CA).

In an articulated clerkship (now a training contract), there was no implied term that the clerk would pass his final examinations: *Stubbes v Trower, Still & Keeling* [1987] IRLR 321, CA. In the absence of any mention of annual pay rises, there was no implied term in a contract of employment that there would always be such a rise: *Murco Petroleum Ltd v Forge* [1987] ICR 282, EAT. In a contract between a trade union and its member, there was no implied term that their contract should comply with the terms of an inter-union agreement: *Spring v National Amalgamated Stevedores and Dockers Society* [1956] 2 All ER 221, [1956] 1 WLR 585. As to the contract between a trade union and its members see further EMPLOYMENT vol 40 (2009) PARA 974 et seq. In a contract of employment, there was no implied term that an employer would always recognise a particular trade union as the negotiating body for a particular employee during the entire period of his contract (*Gallagher v Post Office* [1970] 3 All ER 712); and no implied term in a collective agreement that a worker was not to be paid for overtime (*Ali v Christian Salvesen Food Services Ltd* [1997] ICR 25, [1997] 1 All ER 721, CA).

19 There was no implied term in a solus agreement that the supplier would not abnormally discriminate against a petrol station (*Shell UK Ltd v Lostock Garages Ltd* [1977] 1 All ER 481, [1976] 1 WLR 1187, CA); nor in a performance bond, that default should not be declared where there was force majeure (*State Trading Corp of India Ltd v ED & F Man (Sugar) Ltd* [1981] Com LR 235, CA). An overdraft did not include an implied term that the bank would not lend too much money (*William & Glynn's Bank Ltd v Barnes* [1981] Com LR 205); nor, in his contract with a banker, was there an implied term that a customer would take reasonable care to prevent forgery by his employees (*Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC). To achieve certainty in documentary credits, terms should rarely be implied: *Cauxell Ltd v Lloyds Bank Ltd* (1995) Times, 26 December. There was no implied term in a banking facility, that the bank would give reasonable notice of termination (*Socomex Ltd v Banque Bruxelles Lambert SA* [1996] 1 Lloyd's Rep 156); nor was there an implied term in a valuation of property, that the negligent valuer would be responsible for loss which would have occurred even if the valuation had been accurate (*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, sub nom *South Australia Asset Management Corp v York Montague Ltd* [1996] 3 All ER 365, HL); and in a production sharing agreement, there was no implied term that a party should disregard his own financial position (*Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd* [1997] 1 CL 117, CA).

20 In a contract for the sale of a patent, there was no implied term that the buyer would keep the patent alive (*Re Railway and Electric Appliances Co* (1888) 38 ChD 597); nor was there an implied term in a boxing licence, that the boxer was entitled to notice of alterations in the rules (*Doyle v White City Stadium Ltd* [1935] 1 KB 110, CA). An assignee of an insurance policy did not impliedly promise to warn the insurer that the insured was dishonestly jeopardising the cover: *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 QB 818, [1989] 3 All ER 628, CA (revsd on other grounds [1992] 1 AC 283, [1991] 3 All ER 1, HL). There was no implied term in a market sharing agreement that one manufacturer would restrict his production (*Re Cadbury Schweppes Ltd's Agreement* [1975] 2 All ER 307, sub nom *Re Cadbury Schweppes Ltd and J Lyons & Co Ltd's Agreement* [1975] 1 WLR 1018, RPC); nor was there an implied term in an assignment to the Performing Rights Society that the assignor reserved the right to licence performance in record shops (*Performing Right Society Ltd v Harlequin Record Shops Ltd* [1979] 2 All ER 828, [1979] 1 WLR 851); and there was no implied term in a contract with a holiday tour operator that the operator would be absolved from providing accommodation if the hotel wrongly thought the customer guilty of misbehaviour (*Spencer v Cosmos Air Holidays Ltd* [1989] Abr para 356, CA).

21 In a contract to produce a play at a certain theatre on a certain date, there was no implied term that the parties should be discharged when the theatre had to remain closed for repairs to comply with the requirements of the county council: *Hardie v Balmain* (1902) 18 TLR 539, CA (the council had ordered the repairs prior to the formation of the contract, and the Court of Appeal considered that the theatre management had taken the risk that their builder would complete the alterations in time. If the council had ordered the alterations subsequent to the formation of the contract, it might have been frustrated, as to which see para 897 et seq post). There was no implied term in a contract of repair between the owner of a comprehensively insured car and a garage, that the car owner would pay the whole cost of repairs (*Brown and Davis Ltd v Galbraith* [1972] 3 All ER 31, [1972] 1 WLR 997, CA); nor that the employees of a detective agency would not reveal confidential information (*Easton v Hitchcock* [1912] 1 KB 535. Quære whether this would still be the case now that there is a data protection principle forbidding disclosure: see the Data Protection Act 1984; and CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) para 503 et seq ); nor in a contract with a handwriting expert, that he would not also provide services to the other side of an action (*Harmony Shipping Co SA v Davis* [1979] 3 All ER 177, sub nom *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380, CA).

22 A term will not be implied that a lease is intended to begin within a reasonable time so as to validate an agreement for a lease: *Harvey v Pratt* [1965] 2 All ER 786, [1965] 1 WLR 1025, CA. An agreement for a lease must contain certain minimum essentials, otherwise it is invalid for uncertainty. As to uncertainty generally see para 672 ante; and as to uncertainty in relation to leases see LANDLORD AND TENANT. Cf sales of goods and sales of land, where there may be an implied term that the completion take place within a reasonable time; see para 787 note 9 ante.

A term will not be implied in a lease containing a covenant to insure, that the lessors should place the insurance so as not to impose an unnecessarily heavy burden on the lessees (*Bandar Property Holdings Ltd v JS Darwen (Successors) Ltd* [1968] 2 All ER 305; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 84); nor a condition implied in a contract to sell English land, that the contract would be enforceable in the English courts (*Curragh Investments Ltd v Cook* [1974] 3 All ER 658, [1974] 1 WLR 1559). A term was not implied in respect of a service charge due under a lease that, in the event of supervening legislation rendering advance payment unlawful, the tenant was to pay interest on money borrowed by the landlord to make good the delay (*Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd* [1980] 1 All ER 488, [1980] 1 WLR 425); nor was a term implied into a lease that the lessor would keep the drains in good repair (*Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA). A term was not implied into a contract for the exchange of two building estates that the building work was of good quality (*Barrett Southampton Ltd v Fairclough Building Ltd* (1988) 27 ConLR 62) nor was a term implied in a pre-emption agreement that the seller, having given notice under the agreement, would not change his mind and decide not to sell (*Tuck v Baker* [1990] 2 EGLR 195, CA). Where there was nothing in the contract to indicate that time was of the essence, the court refused to imply a term that the vendors would do nothing to delay the sale (*Chelsea Football and Athletic Co Ltd v SB Property Co Ltd* (1992) Times, 8 April, CA); and in respect of an agreement by a developer to construct a new access for an adjoining landowner, there was no implied term that that access should be created on the latter's land (*Nunn v Mulberry Estates Ltd* [1996] 2 CLY 4930, CA).

23 In a contract for the sale of all the grain to be manufactured by the seller, there was no implied term that the seller would retain his business: *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, CA. See also *Rhodes v Forwood* (1876) 1 App Cas 256, HL (no implied promise in a seven year sole sales agency agreement that owner would not sell the colliery and so deprive the agent of his chance to earn commission; but see now the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053 (as amended); and AGENCY vol 1 (2008) PARA 71 et seq); *Re Royal Aquarium and Summer and Winter Garden Society Ltd* (1903) 20 TLR 35 (no implied promise on the part of entertainment company to life members that the undertaking should continue to exist); *General Publicity Services Ltd v Best's Brewery Co Ltd* [1951] WN 507, CA (no implied term that contract should come to an end if contracting company ceases to carry on business). As to implied covenants for the continuance of a business see generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 254.

In a sale of goods which included a provision for resale price maintenance, there was no implied term that the seller would not dispose of similar goods at a lower price direct to the public: *Livock v Pearson Bros* (1928) 33 Com Cas 188. In a sale of goods where the sellers had done all they were legally required to do, there was no implied obligation on the part of the buyers to remove misunderstandings between their agent and the sellers: *Mona Oil Equipment and Supply Co Ltd v Rhodesia Rlys Ltd* [1949] 2 All ER 1014. As to implied terms in contracts for the sale of goods see generally SALE OF GOODS AND SUPPLY OF SERVICES. In an international contract for the sale of goods, there was no implied condition that the sale be subject to sufficiency of quota: *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51, CA; affd sub nom *Partabmull Rameshwar v KC Sethia (1944) Ltd* [1951] 2 All ER 352n, HL. As to export and import licences see further para 788 ante.

Where time of delivery was extended until a Bank Holiday, there was no implied term extending the time to the day after: *Jacobson van den Berg & Co (UK) Ltd v Biba Ltd* (1977) 121 Sol Jo 333, CA. There was no implied term that the buyer merely had to use due diligence in obtaining all necessary licences (*Congimex Companhia Geral de Comercio Importadora e Exportadora SARL v Tradax Export SA* [1983] 1 Lloyd's Rep 250, CA); nor was there an implied term in a contract to supply gas, that the contract would last for a reasonable time (*Tower Hamlets London Borough Council v British Gas Corp* [1983] Abr para 555, CA); nor that the port of delivery nominated by the buyer would be one that the vessel would be able to enter (*Eurico SpA v Philipp Bros, The Epaphus* [1987] 2 Lloyd's Rep 215, CA); nor, in the sale of a machine using pins, that the seller would continue to supply pins (*Pooleys Pictures v Cooks Export Services Ltd* [1986] BTLC 417, CA); nor that the seller would not do any act before delivery which would reduce the market price of the goods (*Shell International Petroleum Co Ltd v Transnor (Bermuda) Ltd* [1987] 1 Lloyd's Rep 363).

## UPDATE

### 789 Instances where implication rejected

NOTE 14--It is not an implied term in a contract between a builder and a consumer that a price quoted for building work is exclusive of value added tax, despite the existence in the building trade of a custom to that effect: *Lancaster v Bird* (1998) 73 ConLR 22, CA.

NOTE 19--There is no implied term in a contract between a bank and its customer that the bank must inform a customer of a new type of banking facility: *Suriya & Douglas (a firm) v Midland Bank plc* [1999] 1 All ER (Comm) 612, CA. There is no implied term in a syndicated loan facility agreement that a power of the majority of the lenders to alter the agreement would only be exercised for the benefit of the lenders as a whole:

*Redwood Master Fund Ltd v TD Bank Europe Ltd* [2002] EWHC 2703 (Ch), [2006] 1 BCLC 149.

NOTE 21--In a conditional fee agreement, there was no implied term that the fee should not be payable where the company was already being compensated by the government for its claims handling services: *Strydom v Venside Ltd* [2009] EWHC 2130 (QB), [2009] All ER (D) 135 (Aug).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(3) UNFAIR TERMS IN CONSUMER CONTRACTS/790. Introduction.

### **(3) UNFAIR TERMS IN CONSUMER CONTRACTS**

#### **790. Introduction.**

The Unfair Terms in Consumer Contracts Regulations 1994<sup>1</sup> implement a European Council Directive<sup>2</sup> for the purpose of approximating the laws, regulations and administrative provisions of the member states relating to unfair terms in contracts concluded between a business seller or supplier and a consumer<sup>3</sup>. The 1994 regulations, which have the force of statute<sup>4</sup>, have initiated substantial changes to the effectiveness of a wide range of express (and possibly some implied) terms in the relevant contracts, though without prejudice to more stringent national rules<sup>5</sup>, and go far beyond exclusion clauses<sup>6</sup>.

Enforced by the Office of Fair Trading<sup>7</sup>, the ambit of the 1994 regulations is confined to consumer supply contracts<sup>8</sup> governed by English law<sup>9</sup>.

1    Ie the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see para 791 et seq post.

2    Ie EC Council Directive 93/13 (OJ L95, 21.4.93, p 29).

3    See *ibid* art 1(1).

4    Ie by virtue of the European Communities Act 1994 s 2(4). The Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, may therefore repeal inconsistent prior statutes; but they do not amend the Unfair Contract Terms Act 1977 (as to which see para 820 et seq post). Some transactions may be subject to both the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, and the Unfair Contract Terms Act 1977 s 3, in which case a provision may fail under either or both sets of rules; but other transactions may be subject to only one of the two types of rule.

5    See the Department of Trade and Industry *Guidance Notes* para 6.3. In some places the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, follow EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) verbatim, despite the fact that the latter is expressed in the civil law form of drafting. The construction of such regulations does not necessarily follow the ordinary rules of English law; as to their interpretation see generally *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 at 559, [1989] 1 All ER 1134 at 1140, HL, per Lord Oliver of Aylmerton.

6    As to exclusion clauses see para 797 et seq post.

7    See para 796 post.

8    See para 791 et seq post. Cf the Unfair Contract Terms Act 1977; and para 820 et seq post.

9    See further para 791 post.

#### **UPDATE**

#### **790 Introduction**

TEXT AND NOTES--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(3) UNFAIR TERMS IN CONSUMER CONTRACTS/791. Terms to which the relevant regulations apply.

### **791. Terms to which the relevant regulations apply.**

The Unfair Terms in Consumer Contracts Regulations 1994<sup>1</sup> are confined to consumer supply contracts<sup>2</sup>. They do not apply to:

- 138 (1) any contract relating to employment;
- 139 (2) any contract relating to succession rights;
- 140 (3) any contract relating to rights under family law;
- 141 (4) any contract relating to the incorporation and organisation of companies or partnerships; and
- 142 (5) any term incorporated in order to comply with, or which reflects, statutory or regulatory provisions of the United Kingdom<sup>3</sup> or the provisions or principles of international conventions to which the member states<sup>4</sup> or the Community<sup>5</sup> are party<sup>6</sup>.

Subject thereto, the 1994 regulations apply to any term in a contract concluded between a seller<sup>7</sup> or supplier<sup>8</sup> and a consumer<sup>9</sup> where that term has not been individually negotiated<sup>10</sup>. A term is always to be regarded for these purposes as not having been individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term<sup>11</sup> and it is for any seller or supplier who claims that a term was individually negotiated to show that it was<sup>12</sup>. Notwithstanding that a specific term or certain aspects of it in a contract has or have been individually negotiated, the 1994 regulations apply to the rest of a contract if an overall assessment of the contract indicates that it is a pre-formulated standard contract<sup>13</sup>.

The 1994 regulations apply notwithstanding any contract term which applies or purports to apply the law of a non member state, if the contract has a close connection with the territory of the member states<sup>14</sup>.

The 1994 regulations impose limitations as regards the construction of written terms<sup>15</sup> and the unfairness of terms which have not been individually negotiated<sup>16</sup>. In so far, however, as it is in plain, intelligible language<sup>17</sup>, no assessment is to be made of the fairness of any term which:

- 143 (a) defines the main subject matter of the contract<sup>18</sup>; or
- 144 (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied<sup>19</sup>.

<sup>1</sup> I.e. the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see the text and notes 2-19 *infra*; and paras 790 *ante*, 792 *et seq post*.

<sup>2</sup> See the text and notes 7-10 *infra*; and para 790 *ante*.

<sup>3</sup> 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 3.

<sup>4</sup> 'Member state' means a state which is a contracting party to the EEA Agreement but until the EEA Agreement comes into force in relation to Liechtenstein does not include the State of Liechtenstein; and 'EEA Agreement' means the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the protocol signed at Brussels on 17 March 1993: Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 2(1).

5 'The Community' means the European Economic Community and the other states in the European Economic Area: Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 2(1).

6 Ibid reg 3(1), Sch 1. Thus, all the statutory implied or prescribed terms (see para 781 ante) would appear to be excluded; but the regulations are silent as to statutorily permitted terms (eg the Consumer Credit Act 1974 s 100(2): see CONSUMER CREDIT vol 9(1) (Reissue) para 258) and other implied terms (see para 782 ante).

7 For these purposes, 'seller' means a person who sells goods and who, in making a contract to which the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, apply, is acting for purposes relating to his business: reg 2(1). 'Business' includes a trade or profession and the activities of any government department or local or public authority: reg 2(1).

8 'Supplier' means a person who supplies goods or services and who, in making a contract to which the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, apply, is acting for purposes relating to his business: ibid reg 2(1).

9 'Consumer' means a natural person who, in making a contract to which the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, apply, is acting for purposes which are outside his business: reg 2(1).

10 Ibid reg 3(1).

11 Ibid reg 3(3). The expression 'drafted in advance' would appear to envisage that the requisite term is in writing and that its contents were settled before the negotiations began with the consumer, but the recitals to EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) clearly include an oral contract.

12 Ibid reg 3(5). Regulation 3 does not stipulate that the agreement must be signed; and the recitals to EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) clearly include an oral contract.

13 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 3(4). It is submitted that 'pre-formulated' is intended to indicate the totality of terms which are not individually negotiated and 'overall assessment' is intended to allow consideration for the purposes of assessment of both those terms which have been individually negotiated and those which have not.

14 Ibid reg 7. Regulation 7 is also consistent with the Convention on the Law Applicable to Contractual Obligations 1980 (the Rome Convention): see further CONFLICT OF LAWS vol 8(3) (Reissue) para 350.

15 See para 792 post.

16 See para 793 post.

17 As to the requirement to express written terms in plain, intelligible language see the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 6; and para 792 post.

18 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 3(2)(a). As to the difficulty of identifying terms which 'define the main subject matter of the contract' see Macdonald 'Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts' [1994] JBL 441 at 460-462; Brownsword and Howells 'The implementation of the EC Directive on Unfair Terms in Consumer Contracts--some unresolved questions' [1995] JBL 243 at 248-252. As to which pre-contractual representations become terms of the contract see para 767 et seq ante; and as to the incorporation of terms by signature or notice see para 685 et seq ante.

19 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 3(2)(b). This is consistent with the common law rule that a court will not inquire into the adequacy of the consideration: see para 736 ante. Seemingly, the regulations therefore would not apply in the bad bargain cases: cf *C & P Haulage v Middleton* [1983] 3 All ER 94, [1983] 1 WLR 1461, CA. Distinguish the notion of excessively great or small consideration as part of the undue influence rule: see para 712 et seq ante. On the other hand, where a contract requires that a further sum be payable or repayable on the happening of a certain event (cf *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA (sum payable if resumed playing professional football); *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, [1988] 1 All ER 348, CA (enhanced fee if transparencies retained beyond a named date); *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918, CA (interest rate variation clause)), the regulations may envisage the testing of the fairness of that further sum (see the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(3), Sch 2; and para 793 post). 'There is no half-way house between a penalty and liquidated damages. However large the sum stipulated may be, if it is a genuine covenanted pre-estimate of damage, it is not stipulated as in terrorem and so cannot be a penalty': see *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 633-634, [1962] 1 All ER 385 at 402, HL, per Lord Devlin.

## UPDATE

### **791-792 Terms to which the relevant regulations apply, Construction of written contracts**

Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, replaced by Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

#### **791 Terms to which relevant regulations apply**

TEXT AND NOTES--Terms which are implied by common law are not covered by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: *Baybutt v Eccle Riggs Country Park Ltd* (2006) *The Times*, 13 November.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTES 4, 5--SI 1994/3159 reg 2(1) now SI 1999/2083 reg 3(1).

TEXT AND NOTE 6--SI 1999/2083 does not apply to contractual terms which reflect mandatory statutory or regulatory provisions (including such provisions under the law of any member state or in Community legislation having effect in the United Kingdom without further enactment), or reflect the provisions or principles of international conventions to which the member states or the Community are party: reg 4(2).

NOTES 7, 8--'Seller or supplier' now means any natural or legal person who is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned: *ibid* reg 3(1).

NOTE 9--'Consumer' now means any natural person who is acting for purposes which are outside his trade, business or profession: *ibid* reg 3(1).

NOTE 10--SI 1999/2083 applies in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer: reg 4(1). The references in regs 4(1), 8(1) (see PARA 795) to a seller or a supplier include references to a distance supplier and to an intermediary: reg 3(1A) (added by SI 2004/2095). 'Distance supplier' means (1) a supplier within the meaning of the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095; or (2) a supplier of unsolicited financial services within reg 15: SI 1999/2083 reg 3(1B) (added by SI 2004/2095). SI 1999/2083 also applies to the terms on which accommodation is let under the Housing Act 1996 Pt VII (ss 175-218): *R (on the application of Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, [2004] 3 WLR 417.

NOTE 11--SI 1994/3159 reg 3(3) now SI 1999/2083 reg 5(2).

NOTE 12--SI 1994/3159 reg 3(5) now SI 1999/2083 reg 5(4). See *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117, [2010] 18 EG 100 (contract for the sale and lease back of property).

NOTE 13--SI 1994/3159 reg 3(4) now SI 1999/2083 reg 5(3).

NOTE 14--SI 1994/3159 reg 7 now SI 1999/2083 reg 9.

NOTE 17--SI 1994/3159 reg 6 now SI 1999/2083 reg 7.

NOTES 18, 19--SI 1994/3159 reg 3(2) now SI 1999/2083 reg 6(2).

NOTE 19--See *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2001] 2 All ER (Comm) 1000, [2001] 3 WLR 1297 (term in consumer credit agreement which made interest payable on amount of judgment obtained by bank for sums owing by consumer did not concern adequacy of interest earned by bank as remuneration). See also *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [2009] 3 WLR 1215, [2009] All ER (D) 271 (Nov); and SALE OF GOODS AND SERVICES vol 41 (2005 Reissue) PARA 455.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(3) UNFAIR TERMS IN CONSUMER CONTRACTS/792. Construction of written contracts.

## **792. Construction of written contracts.**

A seller<sup>1</sup> or supplier<sup>2</sup> must ensure that any written term<sup>3</sup> of a contract to which the Unfair Terms in Consumer Contracts Regulations 1994<sup>4</sup> apply is expressed in plain, intelligible language<sup>5</sup>. If there is doubt about the meaning of a written term, the interpretation most favourable to the consumer<sup>6</sup> prevails<sup>7</sup>.

1 For the meaning of 'seller' see para 791 note 7 ante.

2 For the meaning of 'supplier' see para 791 note 8 ante.

3 As to the terms to which these provisions apply see para 791 ante; and as to oral terms see para 791 notes 11-12 ante. Note that the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 6 is silent as to terms which have been individually negotiated; quare whether it would apply to such terms?

4 I.e. the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see paras 790-791 ante, 793-796 post.

5 Ibid reg 6. For precedents relating to the sale of goods see 34 Forms and Precedents (5th Edn).

6 For the meaning of 'consumer' see para 791 note 9 ante.

7 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 6. This appears to mirror the common law contra proferentem rule, as to which see para 776 ante.

### **UPDATE**

#### **791-792 Terms to which the relevant regulations apply, Construction of written contracts**

Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, replaced by Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

#### **792 Construction of written contracts**

NOTES 3, 7--SI 1994/3159 reg 6 now SI 1999/2083 reg 7. Regulation 7(2) (interpretation of written term) does not apply in proceedings brought to prevent continued use of unfair terms: see reg 12; and PARA 796.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(3) UNFAIR TERMS IN CONSUMER CONTRACTS/793. Unfair terms; in general.

### **793. Unfair terms; in general.**

For the purposes of the Unfair Terms in Consumer Contracts Regulations 1994<sup>1</sup>, and subject as follows, 'unfair term' means any term which contrary to the requirement of good faith<sup>2</sup> causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer<sup>3</sup>. An assessment of the unfair nature of a term must be made taking into account the nature of the goods or services for which the contract was concluded and referring, as at the time of the conclusion of the contract, to all circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent<sup>4</sup>.

In determining whether a term satisfies the requirement of good faith, regard must be had in particular to the following matters:

- 145 (1) the strength of the bargaining positions of the parties;
- 146 (2) whether the consumer had an inducement to agree to the term;
- 147 (3) whether the goods or services were sold or supplied to the special order of the consumer; and
- 148 (4) the extent to which the seller<sup>5</sup> or supplier<sup>6</sup> has dealt fairly and equitably with the consumer<sup>7</sup>.

The 1994 regulations contain an indicative list of unfair terms<sup>8</sup>. In so far, however, as it is in plain, intelligible language, no assessment is to be made of the fairness of any term which defines the main subject matter of the contract or concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied<sup>9</sup>.

<sup>1</sup> I.e. the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see paras 790-792 ante, 794-796 post.

<sup>2</sup> As to good faith generally see para 613 ante. See also the recitals to EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) ('whereas the assessment, according to general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas in making an assessment of good faith, particular regard must be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account ...'); and see heads (1)-(4) in the text.

<sup>3</sup> Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(1). For the meaning of 'consumer' see para 791 note 9 ante.

<sup>4</sup> Ibid reg 4(2). Cf the Unfair Contract Terms Act 1977 ss 10, 11: see paras 830-831 post. Cf also *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL (in determining fairness, the court was to have regard to the circumstances prevailing at the time of the breach, not at the time the contract was made). The Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(2) reverses this position with regard to contracts to which the 1994 regulations apply. It has been suggested that the circumstances referred to in reg 4(2) are mainly procedural matters such as fraud, duress, undue influence, misrepresentation, non-disclosure and sharp practice: see Beatson, 'European Law and Unfair Terms in Consumer Contracts' [1995] CLJ 235 at 237.



Note, however, that the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 3(2)(a) precludes assessment of the fairness of any term which defines the main subject matter of the contract, provided that that term is in plain, intelligible language: see the text to note 9 *infra*.

5 For the meaning of 'seller' see para 791 note 7 *ante*.

6 For the meaning of 'supplier' see para 791 note 8 *ante*.

7 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(3), Sch 2. Cf the Unfair Contract Terms Act 1977 s 11(2), Sch 2 paras (a)-(c), which are expressed in identical terms to heads (1)-(3) in the text: see para 831 heads (1)-(3) *post*. Head (4) in the text appears to be based on the good faith principle: see paras 613-614 *ante*.

8 See para 794 *post*.

9 See para 791 text and notes 15-19 *ante*.

## UPDATE

### **793-794 Unfair terms; in general, Indicative and illustrative list of terms which may be regarded as unfair**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **793 Unfair terms; in general**

TEXT AND NOTES--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

NOTE 3--SI 1994/3159 reg 4(1) now SI 1999/2083 reg 5(1). The requirement of significant imbalance is met if a contractual term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour: *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2001] 2 All ER (Comm) 1000, [2001] 3 WLR 1297.

Any contractual term providing that a consumer bears the burden of proof in respect of showing whether a distance supplier or an intermediary complied with any or all of the obligations placed on him resulting from European Parliament and EC Council Directive 2002/65 and any rule or enactment implementing it must always be regarded as unfair: SI 1999/2083 reg 5(6) (added by SI 2004/2095). For this purpose, 'rule' means a rule made by the Financial Services Authority under the Financial Services and Markets Act 2000 or by a designated professional body within the meaning of s 326(2) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 749): SI 1999/2083 reg 5(7) (added by SI 2004/2095). For the meaning of 'distance supplier' see PARA 791 NOTE 10.

NOTE 4--SI 1994/3159 reg 4(2) now SI 1999/2083 reg 6(1). See *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] 2 All ER (Comm) 831 (clause providing for arbitration in Denmark not unfair when consumer had chosen to engage Danish workmen and would be able to pay for interpreters). See also *Office of Fair Trading v Foxtons Ltd* [2009] EWCA Civ 288, [2009] 3 All ER 697; and *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] All ER (D) 110 (Jul) (fairness of terms relating to third party renewal of letting arrangements).

TEXT AND NOTE 7--SI 1994/3159 reg 4(3), Sch 2 are not reproduced in SI 1999/2083.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(3) UNFAIR TERMS IN CONSUMER CONTRACTS/794. Indicative and illustrative list of terms which may be regarded as unfair.

#### **794. Indicative and illustrative list of terms which may be regarded as unfair.**

The following is an indicative and non-exhaustive list of terms<sup>1</sup> which may be regarded as unfair<sup>2</sup>, namely terms which have the object or effect of:

- 149 (1) excluding or limiting the legal liability of a seller<sup>3</sup> or supplier<sup>4</sup> in the event of the death of a consumer<sup>5</sup> or personal injury to the latter resulting from an act or omission of that seller or supplier<sup>6</sup>;
- 150 (2) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him<sup>7</sup>;
- 151 (3) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone<sup>8</sup>;
- 152 (4) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract<sup>9</sup>;
- 153 (5) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation<sup>10</sup>;
- 154 (6) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract<sup>11</sup>;
- 155 (7) except in the case of financial services, enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so<sup>12</sup>;
- 156 (8) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early<sup>13</sup>;
- 157 (9) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract<sup>14</sup>;
- 158 (10) except in the case of financial services, enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract<sup>15</sup>;
- 159 (11) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided<sup>16</sup>;
- 160 (12) except in the case of price indexation clauses, providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded<sup>17</sup>;
- 161 (13) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract<sup>18</sup>;

- 162 (14) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality<sup>19</sup>;
- 163 (15) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his<sup>20</sup>;
- 164 (16) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement<sup>21</sup>;
- 165 (17) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract<sup>22</sup>.

Heads (7), (10) and (12) above do not apply to transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control, or to contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency<sup>23</sup>.

1 As to the terms to which these provisions apply see para 791 ante.

2 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4). As to unfairness see generally para 793 ante. Items on the list (sometimes known as 'the grey list') also overlap with some of the rules of the Unfair Contract Terms Act 1977, whether exclusion clauses or not (see para 820 et seq post); or the common law rules as to ouster of the jurisdiction of the court (see para 856 post); forfeiture of deposit (*Fitt v Cassanet* (1843) 4 Man & G 898); or penalties (see *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL). However, others have no counterpart in previous English law: see eg heads (8)-(9), (12) in the text. Examples of such terms are collected together and published from time to time in bulletins issued by the Office of Fair Trading. As to enforcement of the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, by the Director General of Fair Trading see para 796 post.

3 For the meaning of 'seller' see para 791 note 7 ante.

4 For the meaning of 'supplier' see para 791 note 8 ante.

5 For the meaning of 'consumer' see para 791 note 9 ante.

6 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4), Sch 3 para 1(a). Cf the Unfair Contract Terms Act 1977 s 2: see para 822 post.

7 Ibid Sch 3 para 1(b). See also the Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813, art 4; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 656.

8 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, Sch 3 para 1(c).

9 Ibid Sch 3 para 1(d).

10 Ibid Sch 3 para 1(e).

11 Ibid Sch 3 para 1(f).

12 See ibid Sch 3 para 1(g). Schedule 3 para 1(g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately: Sch 3 para 2(a). See also the text to note 23 infra.

13 Ibid Sch 3 para 1(h). See also the Unsolicited Goods and Services Act 1971; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 658-662.

14 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, Sch 3 para 1(i).

15 See *ibid* Sch 3 para 1(j). Cf the Unfair Contract Terms Act 1977 s 3(2)(b)(i): see para 823 post. The Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, Sch 3 para 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately; and is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract: Sch 3 para 2(b). See also the text to note 23 *infra*.

16 *Ibid* Sch 3 para 1(k).

17 See *ibid* Sch 3 para 1(l). Schedule 3 para 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described: Sch 3 para 2(d). See also the text to note 23 *infra*.

18 *Ibid* Sch 3 para 1(m).

19 *Ibid* Sch 3 para 1(n).

20 *Ibid* Sch 3 para 1(o).

21 *Ibid* Sch 3 para 1(p).

22 *Ibid* Sch 3 para 1(q). As to matters of proof see generally CIVIL PROCEDURE.

23 *Ibid* Sch 3 para 2(c).

## UPDATE

### **793-794 Unfair terms; in general, Indicative and illustrative list of terms which may be regarded as unfair**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **794 Indicative and illustrative list of terms which may be regarded as unfair**

TEXT AND NOTES--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

NOTE 2--SI 1994/3159 reg 4(4) now SI 1999/2083 reg 5(5).

NOTES 6-22--SI 1994/3159 Sch 3 para 1 now SI 1999/2083 Sch 2 para 1.

NOTE 22--An exclusive jurisdiction clause is an unfair term because, in requiring a consumer to enter a plea in a jurisdiction outwith his domicile, it may have the effect of persuading the consumer to forgo any legal remedy or defence: *Joined Cases C-240-244/98 Océano Grupo Editorial SA v Murciano Quintero* [2002] 1 CMLR 1226, ECJ, applied in *Case C-243/08 Pannon GSM Zrt v Sustikné Győrfi* [2010] 1 All ER (Comm) 640, ECJ.

NOTE 23--Now SI 1999/2083 Sch 2 para 2(c).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(3) UNFAIR TERMS IN CONSUMER CONTRACTS/795. Consequence of inclusion of unfair terms in contracts.

**795. Consequence of inclusion of unfair terms in contracts.**

An unfair term<sup>1</sup> in a contract concluded with a consumer<sup>2</sup> by a seller<sup>3</sup> or supplier<sup>4</sup> is not binding on the consumer<sup>5</sup>; but the contract continues to bind the parties if it is capable of continuing in existence without the unfair term<sup>6</sup>.

1 As to the terms to which these provisions apply see para 791 ante; and as to unfairness see paras 793-794 ante.

2 For the meaning of 'consumer' see para 791 note 9 ante.

3 For the meaning of 'seller' see para 791 note 7 ante.

4 For the meaning of 'supplier' see para 791 note 8 ante.

5 Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 5(1).

6 Ibid reg 5(2). Cf severance of illegal provisions, sometimes called 'the blue pencil test': see para 877 post.

Where absence of the unfair term would remove all the consideration supplied by the consumer, the contract will fall, there being at most a unilateral offer by the supplier. As to unilateral contracts see para 606 ante; as to the recovery of any money transferred on the grounds of total failure of consideration see RESTITUTION vol 40(1) (2007 Reissue) para 87 et seq.

**UPDATE**

**795 Consequence of inclusion of unfair terms in contracts**

NOTES 5, 6--SI 1994/3159 reg 5 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 8.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(3) UNFAIR TERMS IN CONSUMER CONTRACTS/796. Prevention of continued use of unfair terms.

### **796. Prevention of continued use of unfair terms.**

In some circumstances, the effect of an unfair term will be considered in litigation between a supplier and a consumer. It is, however, also the duty of the Director General of Fair Trading ('the director') to consider any complaint made to him that any contract term<sup>1</sup> drawn up for general use is unfair<sup>2</sup>, unless the complaint appears to the director to be frivolous or vexatious<sup>3</sup>. If, having considered a complaint about any contract term pursuant to this duty, the director considers that the contract term is unfair, he may, if he considers it appropriate to do so, bring proceedings for an injunction (in which proceedings he may also apply for an interlocutory injunction) against any person appearing to him to be using or recommending use of such a term in contracts concluded with consumers<sup>4</sup>.

The director may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers<sup>5</sup>. He must give reasons for his decision to apply or not to apply, as the case may be, for an injunction in relation to any complaint which these provisions require him to consider<sup>6</sup>.

On an application by the director, the court<sup>7</sup> may grant an injunction on such terms as it thinks fit<sup>8</sup>.

The director may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of the Unfair Terms in Consumer Contracts Regulations 1994<sup>9</sup> as may appear to him to be expedient to give to the public and to all persons likely to be affected by those regulations<sup>10</sup>.

1 As to the terms to which these provisions apply see para 791 ante.

2 As to unfairness and its consequences see paras 793-795 ante.

3 See the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, regs 2(1), 8(1). As to the Director General of Fair Trading see COMPETITION vol 18 (2009) PARA 6.

4 Ibid reg 8(2). For the meaning of 'consumer' see para 791 note 9 ante.

5 Ibid reg 8(3). Undertakings so given are published by the director.

6 Ibid reg 8(4).

7 For these purposes, 'court' in relation to England and Wales and Northern Ireland means the High Court: *ibid* reg 2(1).

8 Ibid reg 8(5). An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any party to the proceedings: reg 8(6). Note that, apparently contrary to EC law, there is no provision for representative actions where the Director General of Fair Trading decides not to litigate: see EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) art 7(1). The matter has been referred to the European Court of Justice: see [1996] 3 CL 119; and see Brownsword and Howells 'The implementation of the EC Directive on Unfair Terms in Consumer Contracts--some unresolved questions' [1995] JBL 243 at 260.

9 *Ie* the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see the text and notes 1-8 *supra*; and paras 790-795 ante.

10 Ibid reg 8(7).

**UPDATE****796 Prevention of continued use of unfair terms**

TEXT AND NOTES--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

NOTE 3--SI 1994/3159 regs 2(1), 8(1) now SI 1999/2083 regs 3(1), 10(1)(a). A qualifying body may now notify the OFT (see COMPETITION vol 18 (2009) PARA 6) that it agrees to consider the complaint instead: reg 10(1)(b). If a qualifying body so notifies the director, it is under a duty to consider that complaint: reg 11(1) (amended by virtue of the Enterprise Act 2002 s 2). The qualifying bodies are (1) the Information Commissioner; (2) the Gas and Electricity Markets Authority; (3) the Office of Communications; (4) the Water Services Regulation Authority; (5) the Rail Regulator; (6) every weights and measures authority in Great Britain; and (7) the Financial Services Authority: SI 1999/2083 Sch 1 (substituted by SI 2001/1186; and amended by SI 2003/3182, SI 2006/523).

Director General of Fair Trading replaced by Office of Fair Trading: see COMPETITION vol 18 (2009) PARA 6.

NOTE 4--Now SI 1999/2083 reg 12(1).

NOTE 5--Now *ibid* reg 10(3), which applies to a qualifying body (see NOTE 3) as it applies to the director: reg 11(2). A qualifying body must notify the director of any undertaking given to it by or on behalf of any person as to the continued use of a term which that body considers to be unfair in contracts concluded with consumers: reg 14(a). The director must arrange for the publication in such form and manner as he considers appropriate of details of any undertaking so notified to him by a qualifying body, and details of any undertaking given to him by or on behalf of any person as to the continued use of a term which the director considers to be unfair in contracts concluded with consumers: reg 15(1)(a), (b).

NOTE 6--Now *ibid* reg 10(2), which applies to a qualifying body (see NOTE 3) as it applies to the director: reg 11(2).

NOTE 7--Now *ibid* reg 3(1).

NOTE 8--SI 1994/3159 reg 8(5), (6) now SI 1999/2083 reg 12(3), (4). The director must arrange for the publication in such form and manner as he considers appropriate of the details of any application made by him for an injunction, and of the terms of any undertaking given to, or order made by, the court: reg 15(1)(c). A qualifying body (see NOTE 3) may apply for an injunction only where it has notified the director of its intention to apply at least 14 days before the date on which the application is made, beginning with the date on which the notification was given, or the director consents to the application being made within a shorter period: reg 12(2). A qualifying body must notify the director of the outcome of any application made, and of the terms of any undertaking given to, or order made by, the court: reg 14(b).

NOTE 10--Now *ibid* reg 15(3). The director must inform any person on request whether a particular term to which SI 1999/2083 applies has been the subject of an undertaking given to the director or notified to him by a qualifying body (see NOTE 5), or the subject of an order of the court made upon application by him or notified to him by a qualifying body, and must give that person details of the undertaking or a copy of the order, as the case may be, together with a copy of any amendments which the person giving the undertaking has agreed to make to the term in question: reg 15(2).

For the purpose of facilitating the consideration of a complaint that a contract term drawn up for general use is unfair, or ascertaining whether a person has complied with an undertaking or court order as to the continued use, or recommendation for use, of a term in contracts concluded with consumers, the director or a qualifying body, where appropriate, may require any person to supply a copy of any document which that person has used or recommended for use as a pre-formulated standard contract in dealings with consumers, and information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers: reg 13(1)-(3). Such a request must be made by a notice in writing which may specify the way in which and the time within which it is to be complied with, and be varied or revoked by a subsequent notice: reg 13(4). If a person makes default in complying with a notice, the court may, on the application of the director or of the qualifying body, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application are to be borne by the person in default or by any officers of a company or other association who are responsible for its default: reg 13(6). Nothing in reg 13 compels a person to supply any document or information which he would be entitled to refuse to produce or give in civil proceedings before the court: reg 13(5).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(i) Nature of Exclusion Clauses/797. Nature of exclusion clauses.

## **(4) EXCLUSION CLAUSES**

### **(i) Nature of Exclusion Clauses**

#### **797. Nature of exclusion clauses.**

It is common, particularly in standard form contracts<sup>1</sup>, for one or more parties to seek to exclude or limit the liability for breach of contract or misrepresentation which would otherwise be imposed upon him. Such an exclusion<sup>2</sup> may be in respect of terms implied into the contract by law<sup>3</sup> or may extend to the express terms or representations in, or leading up to, the contract<sup>4</sup>. There are many common law rules concerning the treatment of exclusion clauses<sup>5</sup>. However, these rules may on some occasions be displaced by statute<sup>6</sup>; this is particularly the case in respect of contracts between parties within England and Wales which amount either to domestic contracts<sup>7</sup> or to consumer supply contracts<sup>8</sup>.

1 As to standard form contracts see generally para 771 ante.

2 A clause excluding liability is commonly called an 'exclusion', 'exemption' or 'exceptions' clause. The principles discussed in this section of the title will in many cases also be applicable to 'indemnity clauses' (ie where one contracting party, A, may become liable to a third party, X, and the other contracting party, B, promises to indemnify A: see *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA).

3 See eg *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 KB 17, CA ('new Singer car' an express, not an implied, term of the contract; liability for breach not excluded by clause referring to implied terms). For implied terms generally see para 778 et seq ante.

4 See eg *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, DC ('any express or implied condition, statement or warranty, statutory or otherwise, is hereby excluded'). As to statutory provisions in relation to the exclusion of liability for misrepresentation see para 819 post.

5 See para 803 et seq post.

6 See para 819 post.

7 Ie under the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended): see para 822 et seq post.

8 Ie under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see para 790 et seq ante.

## **UPDATE**

### **797-800 Nature of exclusion clauses ... Attitude of the courts towards exclusion clauses**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

#### **797 Nature of exclusion clauses**

NOTE 4--See *British Fermentation Products Ltd v Compair Reavell Ltd*[1999] 2 All ER (Comm) 389.

NOTE 8--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(i) Nature of Exclusion Clauses/798. Effect of exclusion clauses.

### **798. Effect of exclusion clauses.**

Exclusion clauses are generally of two basic types. One type seeks to exclude or cut down a primary obligation<sup>1</sup> of the contract<sup>2</sup>; the other type seeks to qualify the rights of the promisee upon breach, as, for example by denying or limiting the right to rescind for breach<sup>3</sup>, or by limiting the amount of damages recoverable<sup>4</sup>, or by specifying a time limit for the exercise of the right to rescind or claim damages<sup>5</sup>. If sufficiently widely drawn, a clause of the first type may have the effect of rendering the contract a unilateral one<sup>6</sup> or of removing all contractual force from the agreement<sup>7</sup>; but this effect may be modified by statute<sup>8</sup>.

The approach of a court to an exclusion clause may be coloured by which of the above approaches is taken<sup>9</sup>; or that initial effect may be waived by conduct subsequent to contracting<sup>10</sup>.

1 As to the distinction between 'primary' contractual obligations (ie the duty to do what is promised in the contract) and 'secondary' obligations (eg to pay damages for breach) see *Moschi v Lep Air Services Ltd* [1973] AC 331 at 350, [1972] 2 All ER 393 at 403, HL, per Lord Diplock; and see para 1003 post.

2 For examples of such clauses see para 797 notes 3-4 ante.

3 See eg *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468; and see further SALE OF GOODS AND SUPPLY OF SERVICES.

4 See eg *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; and see further CARRIAGE AND CARRIERS; SHIPPING AND MARITIME LAW. Cf para 799 note 6 post.

5 See eg *Atlantic Shipping and Trading Co v Louis Dreyfus & Co* [1922] 2 AC 250, HL.

6 See paras 800 note 20, 807 post. As to unilateral contracts in general see para 606 ante.

7 See para 800 note 20 post. As to the intention to create legal relations see para 718 et seq ante.

8 Ie by the Unfair Contract Terms Act 1977 s 3(2)(b)(ii): see para 823 post.

9 See para 800 post.

10 *Mitchell & Jewell Ltd v Canadian Pacific Express Co* (1974) 44 DLR (3d) 603, Alberta SC; and see generally para 1025 post.

### **UPDATE**

#### **797-800 Nature of exclusion clauses ... Attitude of the courts towards exclusion clauses**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(i) Nature of Exclusion Clauses/799. Certain clauses not treated as exclusion clauses.

### **799. Certain clauses not treated as exclusion clauses.**

Arbitration clauses<sup>1</sup> and *Scott v Avery* clauses<sup>2</sup> are not, in general<sup>3</sup>, to be treated as exclusion clauses, so that the special rules relating to construction of exclusion clauses<sup>4</sup> and to deviation<sup>5</sup> do not apply to them. The same is true of an agreement for liquidated damages; that is, a genuine pre-estimate of loss<sup>6</sup>, such as a demurrage clause<sup>7</sup>.

Whilst it may be that force majeure clauses are not, strictly speaking, exclusion clauses<sup>8</sup>, they may in practice have the same effect and therefore tend to be similarly strictly construed<sup>9</sup>.

1 See ARBITRATION vol 2 (2008) PARA 1213 et seq.

2 I.e. a clause whereby the making of an award is to be considered as a condition precedent to any right of action: see ARBITRATION vol 2 (2008) PARA 1208 et seq.

3 But see the Misrepresentation Act 1967 s 3(b) (as added); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 803.

4 See paras 803-809 post.

5 See para 811 post.

6 As to liquidated damages agreements see further *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL; and DAMAGES.

7 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL (see further paras 805, 811-812 post).

8 *Fairclough Dodd & Jones Ltd v JH Vantol Ltd* [1956] 3 All ER 921 at 926, [1957] 1 WLR 136 at 143, HL, per Lord Tucker.

9 See paras 804, 906 post.

### **UPDATE**

#### **797-800 Nature of exclusion clauses ... Attitude of the courts towards exclusion clauses**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/A. IN GENERAL/800. Attitude of the courts towards exclusion clauses.

## **(ii) Exclusion Clauses and the Common Law**

### **A. IN GENERAL**

#### **800. Attitude of the courts towards exclusion clauses.**

In the absence of statutory provision<sup>1</sup>, and despite some statements to the contrary<sup>2</sup>, there is probably no general rule of common law to the effect that courts have power to refuse to give effect to exclusion clauses on the ground that they are unreasonable or unconscionable<sup>3</sup>. However, no exclusion clause can protect a party from the consequences of his own fraud<sup>4</sup>; nor require a party to assume what the other party knows to be false<sup>5</sup>; nor produce a result contrary to public policy<sup>6</sup>.

Despite the lack of any general power to strike out exclusion clauses, the courts have, where appropriate, particularly applied the following general rules of the law of contract in order to control the possibilities of abuse inherent in complete freedom of contract<sup>7</sup>:

- 166 (1) a contracting party seeking to rely on an exclusion clause to save himself from liability in contract or tort to the other contracting party must<sup>8</sup> show that it was incorporated as a term of the contract, which usually involves the taking of reasonable steps to bring it to the notice of the other party<sup>9</sup>; and similar principles of incorporation apply to the exclusion by non-contractual disclaimer of tort liability<sup>10</sup>;
- 167 (2) an exclusion clause is to be construed strictly against the party who introduced it and seeks to rely on it; this is known as the *contra proferentem* rule<sup>11</sup>;
- 168 (3) whether a clause amounts to an exclusion clause is a matter of substance and effect, so that a similar attitude is taken to indemnity clauses inserted for the same purpose<sup>12</sup>;
- 169 (4) there is no objection on public policy grounds to excluding rights of set-off<sup>13</sup>;
- 170 (5) if an equitable remedy is sought, the discretion of the court cannot be fettered by a contractual provision<sup>14</sup>;
- 171 (6) where there is a contract between A and B containing an exclusion clause, a third party, X, will not be allowed to shelter behind that clause in the absence of clear evidence that he is a party to the contract and that the clause was intended to protect him<sup>15</sup>; similarly, the burden of an exclusion clause in such a contract will not generally be imposed on him<sup>16</sup>;
- 172 (7) perhaps reflecting the above analysis<sup>17</sup>, there seem to be two divergent views as to how a court should deal with exclusion clauses. First, the court may seek to establish the effect of the contract as a whole, taking into account the exclusion clause in defining the obligations of the parties<sup>18</sup>. Second, the exclusion clause may be regarded as a defence; in which case, the court might establish the *prima facie* ambit of the contractual obligation without the exclusion clause and then consider the effect (if any) of the exclusion clause on that *prima facie* liability<sup>19</sup>;
- 173 (8) in the absence of the very clearest words, an exclusion clause will not be construed so as, in effect, to deprive one party's stipulations of all contractual force<sup>20</sup>.

1 The exclusion clause may, in some circumstances, be unreasonable within the meaning of the Unfair Contract Terms Act 1977 s 11 (see para 831 post) or amount to an unfair term within the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4), Sch 3 paras 1(a) or 1(b) (see para 794 ante).

2 See the dicta in *Van Toll v South Eastern Rly Co* (1862) 12 CBNS 75 at 88; *Parker v South Eastern Rly Co* (1877) 2 CPD 416 at 428, CA; *Watkins v Rymill* (1883) 10 QBD 178 at 179, DC; *Thompson v London Midland and Scottish Rly Co* [1930] 1 KB 41 at 56, CA; *John Lee & Sons (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581 at 584, CA; *Gillespie v Roy Bowles Transport Ltd* [1973] QB 400 at 417, [1973] 1 All ER 193 at 200-201, CA; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69 at 79, [1977] 3 All ER 498 at 503, CA, per Lord Denning MR.

3 *Grand Trunk Rly of Canada v Robinson* [1915] AC 740 at 747, PC; *Ludditt v Ginger Coote Airways Ltd* [1947] AC 233 at 242, [1947] 1 All ER 328 at 330, PC; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848, [1980] 1 All ER 556 at 566, HL, per Lord Diplock. But cf the good faith principle: see para 613 ante.

4 *S Pearson & Son Ltd v Dublin Corp* [1907] AC 351, HL; see further MISREPRESENTATION AND FRAUD. See also *Kollerich & Cie SA v State Trading Corp of India* [1980] 2 Lloyd's Rep 32, CA (false certificates).

5 *Re Banister, Broad v Munton* (1879) 12 ChD 131, CA. See also *Lowe v Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA.

6 *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, [1996] 3 All ER 545, CA; and see para 841 post. See also para 613 ante (good faith principle).

7 Many of these may be seen as illustrations of the good faith principle, as to which see para 613 ante.

8 This is inevitably so in the case of a duty sounding purely in contract. However, many of the cases on exclusion clauses involve duties which might sound either in contract or tort or both (eg the duty of a carrier to take care of goods; and see para 610 ante) or which sound only in tort (eg the duty of stevedores vis-à-vis the owner of goods when the stevedores' contract is with another). Tort liability may generally be excluded by any manifestation of consent on the principle of *volenti non fit injuria* (see eg *Hedley, Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; and see further NEGLIGENCE vol 78 (2010) PARA 69); but where tort liability arises in a contractual context it seems unlikely that a defence based solely upon *volenti non fit injuria* would succeed, in view of the insistence of the courts on an exclusion clause being incorporated in a contract (see eg *Olley v Marlborough Court Ltd* [1949] 1 KB 532, [1949] 1 All ER 127, CA; and para 801 post) to which the defendant is a party (see eg *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; and paras 814-816 post). See also *White v Blackmore* [1972] 2 QB 651 at 666, [1972] 3 All ER 158 at 167, CA, per Lord Denning MR. Cf *Buckpitt v Oates* [1968] 1 All ER 1145; and see *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 at 168, [1974] 1 All ER 1015 at 1021, PC, where the court declined to express an opinion on this point; and para 806 note 9 post.

9 *D & M Trailers (Halifax) Ltd v Stirling* [1978] RTR 468, CA (posterred auction terms did not apply to private treaty sale); and see para 802 post.

10 *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409, [1957] 1 All ER 35, CA; *Birch v Thomas* [1972] 1 All ER 905, [1972] 1 WLR 294, CA; *Burnett v British Waterways Board* [1973] 2 All ER 631, [1973] 1 WLR 700, CA.

11 See *Burton v English* (1883) 12 QBD 218 at 220, CA, per Brett MR, and at 222 per Bowen LJ; *Tor Line AB v Alltrans Group of Canada Ltd, The TFL Prosperity* [1984] 1 All ER 103, [1984] 1 WLR 48, HL. For general discussion of this rule see para 776 ante. The various branches of this rule are considered in paras 803-809 post.

12 *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL (indemnity clause); *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, [1987] 1 WLR 659, CA (exclusion of liability for negligence); *Hancock Shipping Co Ltd v Kawasaki Heavy Industries, The Casper Trader* [1992] 3 All ER 132, [1992] 1 WLR 1025, CA (indemnity clause); *EE Caledonia Ltd v Orbit Valve plc* [1995] 1 All ER 174, [1994] 1 WLR 1515, CA (indemnity clause); *Shell Chemicals UK Ltd v P & O Roadtanks Ltd* [1995] 1 Lloyd's Rep 297, CA (indemnity); *Stirling v Norwest Holst Ltd* 1997 SLT 973 (indemnity).

13 *Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513; *Coca-Cola Financial Corp v Finsat International Ltd* [1998] QB 43, [1996] 2 Lloyd's Rep 274, CA. As to set-off see para 1073 post.

14 *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1991] Abr para 483, CA. As to equitable remedies see para 896 post; and EQUITY.

15 See paras 814-816 post.

16 See para 818 post.

17 See para 798 ante. Or perhaps differences of approach are coloured by whether the contract before the court is a commercial one, the exclusion clause merely apportioning the risk (see para 805 post); or a consumer contract, the exclusion being evidence of unequal bargaining power.

18 *GH Renton & Co Ltd v Palmyra Trading Corpn of Panama*[1957] AC 149, [1956] 3 All ER 957, HL; *East Ham Borough Council v Bernard Sunley & Sons*[1966] AC 406, [1965] 3 All ER 619, HL. 'The task of the courts has been said to be 'to look at the event (consequent on the breach), and to ascertain from the words and conduct of the parties which created the contract between them what their presumed intention was as to what should be their legal rights and liabilities either original or substituted upon the occurrence of an event of that kind': *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers' Association Ltd*[1966] 1 All ER 309 at 347, [1966] 1 WLR 287 at 343, CA, per Diplock LJ (affd sub nom *Henry Kendall & Sons Ltd v William Lillico & Sons Ltd*[1969] 2 AC 31, [1968] 2 All ER 444, HL). See also *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[1967] 1 AC 361 at 431, [1966] 2 All ER 61 at 91-92, HL, per Lord Wilberforce; *Photo Production Ltd v Securicor Transport Ltd*[1980] AC 827 at 851, [1980] 1 All ER 556 at 568, HL, per Lord Diplock; and para 803 post.

19 *Rutter v Palmer*[1922] 2 KB 87 at 92, CA, per Scrutton LJ; *Karsales (Harrow) Ltd v Wallis*[1956] 2 All ER 866, [1956] 1 WLR 936, CA; and see para 820 note 10 post (approach of the courts to the application of the Unfair Contract Terms Act 1977). Contra *State Government Insurance Office v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228.

20 *Stuart v British and African Steam Navigation Co* (1875) 32 LT 257 at 262 per Pollock B; *The Cap Palos*[1921] P 458 at 471-472, CA, obiter per Atkin LJ; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[1967] 1 AC 361 at 432, [1966] 2 All ER 61 at 92, HL, per Lord Wilberforce; see also *Wallis, Son and Wells v Pratt and Haynes*[1910] 2 KB 1003 at 1016, CA, per Fletcher Moulton LJ dissenting; revsd on the grounds given by Fletcher Moulton LJ [1911] AC 394, HL. See also para 807 note 3 post. A contract wherein one party effectively excluded all his liability might take effect as a unilateral contract (see also para 807 post), as to which see para 606 ante. See also *The Berkshire* [1974] 1 Lloyd's Rep 185 (construction of liberty clause).

## UPDATE

### 797-800 Nature of exclusion clauses ... Attitude of the courts towards exclusion clauses

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 800 Attitude of the courts towards exclusion clauses

NOTE 1--SI 1994/3159 reg 4(4), Sch 3 para 1(a), (b) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 para 1(a), (b).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/B. INCORPORATION OF EXCLUSION CLAUSES/801. Exclusion clauses must be incorporated in the contract.

## **B. INCORPORATION OF EXCLUSION CLAUSES**

### **801. Exclusion clauses must be incorporated in the contract.**

To be effective as such<sup>1</sup> an exclusion clause must as a general rule be incorporated in the contract at the time when the contract is made<sup>2</sup>, and it is insufficient if the clause is put forward at a later stage<sup>3</sup>. This rule must, however, be read subject to the following qualifications:

- 174 (1) an exclusion clause may be effectively incorporated into the contract by a subsequent variation of its terms<sup>4</sup>;
- 175 (2) where there has been a previous course of dealing<sup>5</sup> between the parties and the party against whom the clause operates has on previous occasions been put on notice<sup>6</sup> of the other party's intention to contract on the basis of the clause, it may be incorporated in the contract notwithstanding that it is contained in a document such as a confirmation note, which, according to general principles, would come too late in time to be part of the contract<sup>7</sup>. This doctrine will not, however, be extended to cover cases where there has been a departure from the pattern of the previous course of dealing<sup>8</sup>;
- 176 (3) where the bargaining power of both parties is equal and both are in the same line of business and know of the contractual terms in common use in that business, those terms may be regarded as being incorporated into an oral contract<sup>9</sup>;
- 177 (4) in certain circumstances, an apparently post-contractual document such as a confirmation note may, on the proper interpretation of the conduct of the parties, form the contract itself<sup>10</sup>, in which case an exclusion clause in the note will clearly be incorporated;
- 178 (5) an exclusion clause in a contractual document may be modified or deprived of effect by a collateral and overriding undertaking or by a misrepresentation as to the effect of the clause<sup>11</sup>.

1 Cf para 800 note 3 ante.

2 As to the requirement of reasonable notice see para 802 post.

3 *Olley v Marlborough Court Ltd* [1949] 1 KB 532, [1949] 1 All ER 127, CA (guest registered at hotel reception, where contract made; later saw exclusion clause in notice in bedroom: clause ineffective); *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA (where a ticket is issued from an automatic machine the act of the customer in causing the ticket to be issued is an irrevocable step and other terms cannot thereafter be incorporated into the contract; see also para 638 ante); *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70 (ferry ticket booked through friend: held friend's knowledge was P's knowledge (agent); but contract complete before arrival of ticket); *Daly v General Steam Navigation Co Ltd, The Dragon* [1979] 1 Lloyd's Rep 257 (affd on other grounds [1980] 3 All ER 696, [1981] 1 WLR 120, CA) (exclusion clause in contract of carriage not mentioned when passage booked, but contained in subsequently issued ticket, invalid); *Spriggs v Southeby Parke Bernet & Co* [1986] 1 Lloyd's Rep 487, CA (exclusion clause contained in instructions for sale on reverse of form); *Jayaar Impex Ltd v Toaken Group Ltd (t/a Hicks Bros)* [1996] 2 Lloyd's Rep 437 (telephone agreement; subsequently supplied written terms not part of it). As to the time at which the contract is concluded in 'ticket' contracts see para 638 ante.

4 As to variation see paras 1019-1024 post.

5 *Henry Kendall & Sons Ltd v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA (many previous dealings between parties); *Britain and Overseas Trading (Bristles) Ltd v Brooks Wharf and Bull Wharf Ltd* [1967] 2 Lloyd's Rep 51 (contractual relations



spanning 50 or 80 years); *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676, CA (Dutch seller deposited copy of his conditions with all district courts in Holland); *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Export)* [1988] 2 Lloyd's Rep 427, CA. See further paras 689 note 3, 780 ante.

No course of dealings was established in the following cases: *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL (insufficient consistency over five dealings); *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA (three or four transactions over five years not sufficient to constitute such a course of dealing as to incorporate term in previous written contracts into subsequent oral contract); *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 Lloyd's Rep 570 (no course of dealings established between defendants and third party).

6 As to what constitutes reasonable notice see para 802 post.

7 *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA; *Britain and Overseas Trading (Bristles) Ltd v Brooks Wharf and Bull Wharf Ltd* [1967] 2 Lloyd's Rep 51; *Transmotors Ltd v Robertson, Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224. See also *Eastman Chemical International AG v NMT Trading Ltd and Eagle Transport Ltd* [1972] 2 Lloyd's Rep 25 (no written contract but defendants had previously accepted without demur under other contracts, invoice notes containing standard conditions; conditions incorporated in contract in question).

8 *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, HL.

9 *British Crane Hire Corp'n Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, CA. Where such terms are incorporated it is on the basis of trade usage: see para 780 ante.

10 See eg *Roe v RA Naylor Ltd* (1918) 87 LJB 958 and *Roe v RA Naylor Ltd* [1917] 1 KB 712, DC; and see Hoggett 'Changing a Bargain by Confirming it' (1970) 33 MLR 518. See also *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450; and para 638 ante.

11 See para 802 head (7) post.

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## **802. Reasonable notice of exclusion clause.**

For an exclusion clause to be incorporated into an unsigned contract, the party against whom it is to operate must be given reasonable notice of its existence by the other party<sup>1</sup>. Whether such notice has been given is determined according to the following principles:

- 179 (1) if the party against whom the clause operates has actual knowledge of the clause at the time when the contract is concluded he is inevitably bound by it<sup>2</sup>;
- 180 (2) when there is no actual knowledge, the party against whom the clause operates will not be bound if he has no reason to believe that the document containing the clause contained contractual terms, in which case the document may be characterised as a mere receipt<sup>3</sup>;
- 181 (3) if the party against whom the clause operates has reason to believe that a document given to him contains contractual terms<sup>4</sup> he may be bound by those terms, including any exclusion clause, even though he does not choose to read the document<sup>5</sup>; if the document contains what is reasonably necessary to bring the terms to the attention of a reader, the recipient will be bound<sup>6</sup>, even if the terms can only be discovered by a circuitous route<sup>7</sup>; but he will not be bound if it does not do so<sup>8</sup>;
- 182 (4) if the party putting forward the exclusion clause in his favour (the proferens) has done that which is normally sufficient to give reasonable notice of the clause, it may bind the other party even though, due to some personal disability<sup>9</sup>, he is unable to understand the clause<sup>10</sup>. It may be, however, that if such disability is known to the party seeking to impose the exclusion clause he must take such further steps as are reasonable to bring the clause to the notice of the person under the disability<sup>11</sup>;
- 183 (5) it may be that the more onerous the consequences of the exclusion clause for the party on whom it is imposed, the more forceful must be the notice which he is given of it<sup>12</sup>;
- 184 (6) in the absence of fraud or misrepresentation a party will be bound by an exclusion clause in a document which he has signed<sup>13</sup>, provided at least that the document appeared to be of a contractual nature and that the term was capable of exclusion<sup>14</sup>;
- 185 (7) if the effect of an exclusion clause is misrepresented by the party seeking to impose it, or by his agent, he will prima facie be held to the meaning of the clause as represented<sup>15</sup>; and a similar principle applies where that party or his agent<sup>16</sup> gives a collateral assurance that varies or extinguishes the effect of the exclusion clause<sup>17</sup>.

1 See para 688 ante. The same principle of reasonable notice applies where, independently of any contract, a notice or condition seeks to exclude tortious liability: see *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409, [1957] 1 All ER 35, CA (conditional licence to enter land); and see para 800 ante; and NEGLIGENCE vol 78 (2010) PARAS 7, 38.

2 *Parker v South Eastern Rly Co* (1877) 2 CPD 416 at 425-426, CA, per Baggallay and Bramwell LJ respectively. See generally para 688 ante. See also para 801 text to note 9 ante.

3 *Chapleton v Barry UDC* [1940] 1 KB 532, [1940] 1 All ER 356, CA (customer acted reasonably in treating deck-chair ticket as mere receipt, not contractual document); *Jude v Edinburgh Corpn* 1943 SC 399 (notice in

public vehicle warning passengers against descending from moving vehicle a mere warning, not a contractual term); *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805 at 809, [1951] 1 All ER 631 at 634, CA, obiter per Denning LJ; *Taylor v Glasgow Corp* 1952 SC 440 (ticket for public baths not a contractual document); *Parker v South Eastern Rly Co* (1877) 2 CPD 416 at 422, CA, per Mellish LJ; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41 at 49, CA, per Lord Hanworth MR; *Grogan v Robin Meredith Plant Hire* (1996) 15 Tr LR 371, CA (time-sheet).

4 In the following cases tickets supplied have been held to be, or to be capable of being, contractual documents: *Parker v South Eastern Rly Co* (1877) 2 CPD 416, CA (railway cloakroom ticket); *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA (railway ticket); *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, HL; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450 (steamship tickets); *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442 (railway cloakroom ticket). It is otherwise if no ticket is handed over: *Adams (Durham) Ltd v Trust Houses Ltd* [1960] 1 Lloyd's Rep 380.

5 *Parker v South Eastern Rly Co* (1877) 2 CPD 416, CA; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837, HL; *Nunan v Southern Rly Co* [1923] 2 KB 703; *Penton v Southern Rly Co* [1931] 2 KB 103; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450; *Budd v Peninsular and Oriental Steam Navigation Co* [1969] 2 Lloyd's Rep 262; *Mendelssohn v Normand Ltd* [1970] 1 QB 177 at 182, [1969] 2 All ER 1215 at 1217, CA, obiter per Lord Denning MR.

6 See the cases cited in note 5 supra.

7 The fact that a party receiving a ticket referring to conditions has to take some further steps to find out what they actually are does not mean that reasonable notice has not been given: *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA (see para 689 note 10 ante); *Goodyear Tyre & Rubber Co (Great Britain) Ltd v Lancashire Batteries Ltd* [1958] 3 All ER 7, [1958] 1 WLR 857, CA; *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd's Rep 570 at 599.

8 *Henderson v Stevenson* (1875) LR 2 Sc & Div 470, HL (condition on back; no reference on front of ticket); *Richardson, Spence & Co and Lord Gough Steamship Co v Rowntree* [1894] AC 217, HL (steamship ticket); *Sugar v London, Midland and Scottish Rly Co* [1941] 1 All ER 172 ('for conditions see back' obliterated by date stamp); *D & M Trailers (Halifax) Ltd v Stirling* [1978] RTR 468, CA (notice in auction room did not apply to private sale of withdrawn lot); *Kowalewich v Airwest Airlines Ltd* [1978] 2 WWR 60, BC SC (exclusion on reverse side of airline ticket); and see note 11 infra. See further CARRIAGE AND CARRIERS. Where it is sought by notice to vary a pre-existing contractual relationship more effective notice may be required than in the 'ticket' cases: *Burnett v Westminster Bank Ltd* [1966] 1 QB 742, [1965] 3 All ER 81 (notice on new cheque book).

As to small or illegible print see *Paterson Zochonis & Co Ltd v Elder Dempster & Co Ltd* [1923] 1 KB 420 at 441, CA, per Scrutton LJ (revsd on another point [1924] AC 522, HL); and, where that occurs in a consumer supply contract, see the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 6; and para 792 ante.

9 Eg illiteracy or blindness. The same considerations do not necessarily apply to a 'legal' disability, for there the contract may not be binding anyway. Thus a contract by a minor which contains an exclusion clause may not be binding upon him as not being for his benefit: see *Flower v London and North Western Rly Co* [1894] 2 QB 65, CA; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 13. A contract by a person suffering from mental disorder is binding unless owing to the mental disorder he is unable to understand what he is doing and the other party is aware of this (see *Imperial Loan Co v Stone* [1892] 1 QB 599, CA; and MENTAL HEALTH vol 30(2) (Reissue) para 597 et seq) in which case the contract will be voidable at the option of the mentally disordered person. As to contractual disabilities see also paras 630, 649 ante.

10 *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, CA (illiteracy of principal; but literate agent).

11 Cf *Lee v Ah Gee* [1920] VLR 278, Vict SC (Chinese who did not understand English not bound by contract he had signed, though no misrepresentation by other party; lack of understanding should have been obvious to other party).

12 *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 at 125, [1956] 1 WLR 461 at 466, CA, obiter per Denning LJ (cited in para 689 note 18 ante); *Adams (Durham) Ltd and Day v Trust Houses Ltd* [1960] 1 Lloyd's Rep 380 at 387 per Mr Commissioner Fenton Atkinson QC; *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686, CA; cf *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41 at 52-53, CA, per Lawrence LJ. See also *Parker v South Eastern Rly Co* (1877) 2 CPD 416 at 428, CA, obiter per Bramwell LJ ('What if there were some unreasonable conditions, as for instance to forfeit £1,000 if the goods were not removed in 48 hours? Would the depositor be bound ... In my judgment he would not be bound ... I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read ... no condition not relevant to the matter in hand'); *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70; and see para 689 ante.

13 *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, DC; cf *R Simon & Co Ltd v Peder P Hedegaard AS* [1955] 1 Lloyd's Rep 299; see further para 686 ante. As to non est factum see para 687 ante.

14 As to exclusion clauses which are rendered void by statute see para 819 et seq post. For the necessity of clarity see para 803 post.

15 *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805, [1951] 1 All ER 631, CA; *Jaques v Lloyd D George & Partners Ltd* [1968] 2 All ER 187, [1968] 1 WLR 625, CA; cf *JH Saphir (Merchants) Ltd v Zissimos* [1960] 1 Lloyd's Rep 490. In some circumstances, the effect of a misrepresentation may be so great as to give rise to a plea of non est factum: see para 687 ante.

16 In *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA, the printed conditions prevented variation of the terms except in writing by the defendants' manager; a garage attendant made an oral promise to lock the car and this was held, on the basis of ostensible authority, to override a printed condition exempting the defendants from liability. Since the plaintiff was bound by the printed conditions even though he had not read them (see note 5 supra) and since there can be no ostensible authority which conflicts with a known, actual authority, it would seem one is driven to the conclusion that the plaintiff was fixed with notice of all the terms in the printed conditions except that limiting the agent's authority (but nowadays, that clause might be avoided as being an unfair term: see the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4), Sch 3 para 1(n); and para 794 ante).

See also *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 3 All ER 511, [1974] 1 WLR 1335. If it amounted to a consumer supply contract, such a term might amount to an unfair term: see the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4), Sch 3 para 1(n); and para 794 ante.

17 *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103, CA; *Webster v Higgin* [1948] 2 All ER 127, CA; *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA; *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA; *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA. For the parol evidence rule in this context see para 622 ante; and DEEDS AND OTHER INSTRUMENTS.

## UPDATE

### 802 Reasonable notice of exclusion clause

NOTES--See also *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 All ER (Comm) 519, CA; and *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 3 All ER 342 (exclusion clause incorporated into arbitration agreement by reference).

NOTE 8--SI 1994/3159 reg 6 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 7.

NOTE 16--SI 1994/3159 reg 4(4), Sch 3 para 1(n) now SI 1999/2083 reg 5(5), Sch 2 para 1(n).

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### **C. RULES OF CONSTRUCTION**

#### **803. Necessity for clear words: the contra proferentem rule.**

Subject to the view taken as to the basic effect of exclusion clauses<sup>1</sup>, the underlying rule of construction is that, under the contra proferentem rule<sup>2</sup>, exclusion clauses require clear words to exclude a liability which would otherwise arise; and a similar attitude is taken by the courts to indemnity clauses<sup>3</sup> and provisos<sup>4</sup>; but it may be that the rule applies less strictly to clauses which merely limit the amount of damages recoverable<sup>5</sup>. Thus any ambiguity is to be construed against the party putting forward the clause for his protection<sup>6</sup>. For instance, where it is to the disadvantage of the offeror (the proferens<sup>7</sup>), the courts have attributed precise legal meanings to technical terms, regardless of whether the parties understood the technicalities: clauses excluding warranties have been held ineffective to exclude conditions<sup>8</sup>; clauses excluding implied terms have been held not to affect liability for breach of express conditions<sup>9</sup>; the exclusion of consequential loss will not cover naturally resulting loss<sup>10</sup>; a 14-day notice period in respect of goods delivered did not cover goods which were not delivered<sup>11</sup>; a pre-shipment inspection clause has been narrowly construed<sup>12</sup>; and there is a dislike of departures from the implied obligations ordinarily accepted by parties entering into a contract of a particular kind<sup>13</sup>.

This basic rule has been qualified and extended as follows:

- 186 (1) general words of exclusion will not usually be construed so as to cover serious or 'fundamental' breaches going to the root of the contract<sup>14</sup>;
- 187 (2) general words of exclusion may be construed as having no application to liability for negligence<sup>15</sup> or misrepresentation<sup>16</sup>;
- 188 (3) the court may refuse to give effect to an exclusion clause which is repugnant to another provision of the contract<sup>17</sup>;
- 189 (4) an exclusion clause will not usually be construed in such a way as to deprive an agreement of contractual content and turn it into a mere declaration of intent<sup>18</sup>;
- 190 (5) exclusion clauses will be construed in such a way that they do not protect a party who is acting outside the 'four corners' of the contract<sup>19</sup> or whose performance is different in kind from that contemplated by the contract<sup>20</sup>;
- 191 (6) clauses which only limit liability are likely to be less strictly construed than clauses which purport to exclude liability entirely<sup>21</sup>; and
- 192 (7) exclusion clauses are likely to be less strictly construed where there is a statutory power to control them<sup>22</sup>.

1 It has been pointed out that it is a question 'whether the effect of an exception clause in a contract is to absolve a party from liability for the consequences of a breach of duty, or whether its effect is to define substantively the limits of his duty by negating obligations that the law would otherwise imply': *Thomas National Transport (Melbourne) Pty Ltd and Pay v May and Baker (Australia) Pty Ltd* [1966] 2 Lloyd's Rep 347 at 364, Aust HC, per Windeyer J dissenting, citing Coote *Exception Clauses*; and see *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400 at 417, [1973] 1 All ER 193 at 200, CA, per Lord Denning MR; *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059; and see para 800 ante. For an instance of the application of the basic rule to a building contract see *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 183.

2 See para 776 ante.

3 See para 800 ante.

4 *Ackermann v Protim Service Ltd* [1988] Abr para 356, CA.

5 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101 at 102, [1983] 1 WLR 964 at 966, HL, per Lord Wilberforce, and at 105 and 970 per Lord Fraser of Tullybelton; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 814, [1983] 2 All ER 737 at 742, HL, per Lord Bridge of Harwich; and see note 21 infra. Contra *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 68 ALR 385, Aust HC.

6 *Burton v English* (1883) 12 QBD 218, CA; *J Gordon Alison & Co Ltd v Wallsend Shipway and Engineering Co Ltd* (1927) 43 TLR 323, CA; *Webster v Higgin* [1948] 2 All ER 127, CA; *John Lee (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581, CA; *DH Broad Ltd v General Accident, Fire and Life Assurance Corp Ltd* [1951] 2 Lloyd's Rep 201 (affd [1951] 2 Lloyd's Rep 295, CA); *Board of Trade v Steel Bros & Co Ltd* [1951] 2 Lloyd's Rep 259; *Minister of Materials v Steel Bros & Co Ltd* [1952] 1 All ER 522, CA; *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468; *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247, [1953] 2 All ER 1409, CA; *B Kilroy Thompson Ltd v Perkins and Homer Ltd* [1956] 2 Lloyd's Rep 49; *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL; *Derby Cables Ltd v Frederick Oldridge Ltd* [1959] 2 Lloyd's Rep 140; *Lowe v Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA; *Akerib v Booth Ltd* [1961] 1 All ER 380, [1961] 1 WLR 367, CA; *FS Stowell Ltd v Nicholls & Co (Brighton) Ltd* [1963] 2 Lloyd's Rep 275, county court; *Macartney-Filgate v Bishop & Sons Depositories Ltd* [1964] 2 Lloyd's Rep 480; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL; *Navico AG v Vrontados Naftiki Etairia PE* [1968] 1 Lloyd's Rep 379; *Billyack v Leyland Construction Co Ltd* [1968] 1 All ER 783, [1968] 1 WLR 471; *Adams v Richardson and Starling Ltd* [1969] 2 All ER 1221, [1969] 1 WLR 1645, CA; *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1, CA; *Kenyon, Son and Craven Ltd v Baxter Hoare & Co Ltd* [1971] 2 All ER 708, [1971] 1 WLR 519; *Mayfair Photographic Supplies (London) Ltd v Baxter Hoare & Co Ltd and Stembidge* [1972] 1 Lloyd's Rep 410; *The Rossetti* [1972] 2 Lloyd's Rep 116; cf *Nippon Yusen Kaisha v Acme Shipping Corp Ltd* [1972] 1 All ER 35, [1972] 1 WLR 74, CA ('damage' construed as including pure financial loss); *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA. See also *Harbour Cold Stores Ltd v Chas E Ramson Ltd* [1980-84] LRC (Comm) 308, Jam CA; *Hillis Oil & Sales Ltd v Wynn's Canada Ltd* (1986) 25 DLR (4th) 649, Can SC.

7 Contra where a strict construction would be to the advantage of the proferens: *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL.

8 *Wallis Son & Wells v Pratt and Haynes* [1911] AC 394, HL; *Baldry v Marshall* [1925] 1 KB 260, CA; *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA; *Nicholson and Venn v Smith Marriott* (1947) 177 LT 189; *Lowe v Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA.

9 *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 KB 17, CA; see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 105. Cf para 994 post.

10 *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep 55, CA.

11 *Ernest Beck & Co v K Szymanowski & Co* [1924] AC 43, HL.

12 *Kollerich & Cie SA v State Trading Corp of India* [1980] 2 Lloyd's Rep 32, CA.

13 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 850, [1980] 1 All ER 556 at 567, HL, per Lord Diplock.

14 See para 805 post.

15 See para 806 post.

16 *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573.

17 See para 807 post.

18 See para 800 ante.

19 See para 808 text and notes 27-30 post.

20 See para 808 post.

21 In *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL, in delivering the judgment of the House, Lord Bridge of Harwich declined to read an ambiguity into (a limitation

clause) by a 'process of strained construction', adding 'the very strict principles ... applicable to exclusion and indemnity clauses cannot be applied in their full rigour to limitation clauses' (at 814 and 742); and see note 5 supra.

22 See *Photo Production Ltd v Securicor Transport Ltd*[1980] AC 827, [1980] 1 All ER 556, HL; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*[1983] 1 All ER 101, [1983] 1 WLR 964, HL; *Macey v Qazi* [1987] CLY 425, CA; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*[1983] 2 AC 803, [1983] 2 All ER 737, HL; and see note 21 supra. As to the statutory control of exclusion clauses see para 819 et seq post.

## UPDATE

### 803 Necessity for clear words: the contra proferentem rule

NOTES--See *BHP Petroleum Ltd v British Steel plc*[2000] 2 All ER (Comm) 133, CA.

NOTES 13, 14--See *Trafigura Beheer BV v Mediterranean Shipping Co SA*[2007] EWCA Civ 794, [2008] 1 All ER (Comm) 385 (delivery of cargo against forged bill of lading).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/C. RULES OF CONSTRUCTION/804. Questions of proof.

#### 804. Questions of proof.

The matter before the court may be a dispute as to the facts rather than a dispute as to the proper construction of an exclusion clause, because it can happen that a loss occurring in one way will fall within the exclusion clause whilst a loss occurring in another way will not<sup>1</sup>. On the issue of burden of proof which may then arise, the general rule would appear to be that if the promisor makes out a prima facie case that the facts are within the exclusion clause, it is then for the promisee to show that the damage falls outside the clause<sup>2</sup>. The matter is one of substance, not form, so that it is a question of construction of the instrument as a whole<sup>3</sup>; and any ambiguity will be resolved against the promisor (proferens)<sup>4</sup>. If the exclusion clause merely excludes particular cases which, but for the clause, would fall within the promise then the promisor must show that events have occurred which bring the case within the clause<sup>5</sup>; if, on the other hand, the exception qualifies the whole promise, the onus lies upon the promisee to show that the promise has been broken notwithstanding the exclusion clause<sup>6</sup>.

However, in contracts involving bailment, the position previously described<sup>7</sup> may vary because of the general principle of bailments for reward that the burden of excusing the loss lies upon the bailee<sup>8</sup>. Although the prima facie rules coincide<sup>9</sup>, it may therefore be that the burden always remains with the bailee<sup>10</sup>.

To ease his burden of proof, the promisor may insert in the contract a clause by which the promisee acknowledges a particular state of affairs to exist. Besides being read contra proferentem<sup>11</sup>, it has been held that such a clause can only operate by giving rise to an estoppel, preventing the party giving the acknowledgment from asserting the contrary<sup>12</sup>: it must therefore be shown that (1) the acknowledgment is clear and unambiguous; (2) the acknowledgor intended the statement to be acted upon<sup>13</sup>; and (3) the acknowledgee in fact believed the statement to be true and acted upon that belief<sup>14</sup>.

1 A similar issue arises with force majeure clauses: see para 906 post.

2 *The Glendarroch* [1894] P 226 at 231, CA; *Munro, Brice & Co v War Risks Association* [1918] 2 KB 78 (revsd on other grounds [1920] 3 KB 94, CA); cf *Hurst v Evans* [1917] 1 KB 352.

3 *Munro, Brice & Co v War Risks Association Ltd* [1918] 2 KB 78 at 89 per Bailhache J.

4 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101 at 105, [1983] 1 WLR 964 at 969-970, HL, per Lord Fraser of Tullybelton; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 813, [1983] 2 All ER 737 at 741, HL, per Lord Bridge of Harwich.

5 *HC Smith Ltd v Great Western Rly Co* [1922] 1 AC 178, HL; *Firestone Tyre & Rubber Co Ltd v Vokins & Co Ltd* [1951] 1 Lloyd's Rep 32; *Kenyon Son and Craven Ltd v Baxter Hoare & Co Ltd* [1971] 2 All ER 708, [1971] 1 WLR 232; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215.

6 *Munro, Brice & Co v War Risks Association* [1918] 2 KB 78 (marine insurance); subsequent proceedings sub nom *Munro, Brice & Co v Marten* [1920] 3 KB 94, CA.

7 See the text and note 2 supra.

8 See BAILMENT. This may explain some of the cases on deviation: see para 811 post.

9 See *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546; and CARRIAGE AND CARRIERS; see also *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 at 124, [1956] 1 WLR 461 at 465, CA; *Karsales (Harrow) Ltd v*



*Wallis* [1956] 2 All ER 866 at 868-869, [1956] 1 WLR 936 at 940, CA, per Lord Denning LJ, and at 870-871, 943 per Lord Parker LJ; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576 at 588-589, [1959] 3 All ER 182 at 186, PC; *Yeoman Credit Ltd v Apps* [1962] 2 QB 508 at 520, [1961] 2 All ER 281 at 289-290, CA; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683 at 710, [1963] 2 All ER 432 at 442, CA.

10 *Woolmer v Delmer Price Ltd* [1955] 1 QB 291, [1955] 1 All ER 377; *Meling v Minos Shipping Co Ltd, The Oliva* [1972] 1 Lloyd's Rep 458; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA; cf *Hunt and Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 QB 617, [1962] 1 All ER 111, CA; *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd, The Antwerpen* [1994] 1 Lloyd's Rep 213 at 238, NSW SC.

Cf *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 3 All ER 641, [1977] 1 WLR 635, CA.

11 See para 803 ante.

12 *Lowe v Lombank Ltd* [1960] 1 All ER 611, [1960] 1 WLR 196, CA (clause 9), where in delivering the judgment of the court, Diplock J said of clause 9 (at 615 and 204): 'To call it an agreement as well as an acknowledgment by the plaintiff cannot convert a statement as to past facts known by both parties to be untrue into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future'. As to how such a clause affects the statutory reasonableness test see para 831 post.

13 *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352.

14 *Lowe v Lombank Ltd* [1960] 1 All ER 611 at 616, [1960] 1 WLR 196 at 205, CA. As to estoppel see generally para 702 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/C. RULES OF CONSTRUCTION/805. Fundamental breach.

### 805. Fundamental breach.

At one time it was considered that there was a rule of law whereby no exclusion clause could protect a party from liability for a 'fundamental breach'<sup>1</sup> or breach of a 'fundamental term'<sup>2</sup> of the contract<sup>3</sup>. It is now clear that no such rule of law exists and that the earlier cases are only justifiable on grounds of construction of the individual contract involved<sup>4</sup>.

The turning point was a charterparty case, where the shipowners affirmed the contract after the charterer's breach and were held by the House of Lords to be bound by the demurrage clause<sup>5</sup>. This seemed to decide that, in all cases, the question is one of construction and the court must determine whether an exclusion clause is sufficiently wide to give exemption from the consequences of the breach in question<sup>6</sup>. If the clause is sufficiently wide the result may be that the breach in question is reduced in effect or not made a breach at all<sup>7</sup> by the terms of the clause<sup>8</sup>, notwithstanding that without the clause it would be a breach of sufficient gravity to allow the other party to be discharged from the contract<sup>9</sup>. The doctrine of fundamental breach, however, has survived to this extent, that general words of exclusion will not as a rule be construed so as to cover such a breach<sup>10</sup>, at least if that breach involves a performance of the contract which can be said to be substantially different in kind from that originally contemplated by the contract<sup>11</sup>.

Whilst the court in that case seemed to confirm that the application of an exclusion clause would be a matter of construction if the contract was affirmed by the innocent party after breach, this apparently left room for the continued existence of a rule of law that an exclusion clause could not be relied upon where the contract came to an end upon or after breach<sup>12</sup>. However, in a second major case, where the breach of contract had such a calamitous effect as automatically to bring the contract to an end<sup>13</sup>, the House of Lords firmly rejected the view that that the exclusion clause came to an end with the contract<sup>14</sup> and re-affirmed that the effect of the exclusion clause remained a matter of construction<sup>15</sup>, a view vigorously supported by a subsequent decision<sup>16</sup>.

Accordingly, whether a contract comes to an end or not after even a fundamental breach or breach of a fundamental term, it would seem that in all cases the effect of an exclusion clause is a matter of construction<sup>17</sup>. That effect is considered later<sup>18</sup>.

1 This expression has been said to be no more than a convenient shorthand term for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract entitling the other party to rescind: *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 397, [1966] 2 All ER 61 at 70, HL, per Lord Reid, at 421-422 and at 86 per Lord Upjohn; cf at 393 and 68 per Viscount Dilhorne (a fundamental breach is a breach which makes the performance of the contract something totally different from that contemplated); cf also para 808 post. The doctrine of fundamental breach could be seen in terms of the notion of good faith dealings: see para 613 ante.

2 On one view a fundamental term is no more than a condition (as to which see paras 993-994 post): *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 422, [1966] 2 All ER 61 at 86, HL, per Lord Upjohn. But it has also been said that a fundamental term is something narrower than a condition and which underlies the whole contract, so that if it is not complied with, the performance of the contract becomes something totally different from that which the contract contemplates: *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* supra at 393 and at 68 per Viscount Dilhorne, citing *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471 at 1473, [1953] 1 WLR 1468 at 1470 per Devlin J. See also *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, [1974] 1 WLR 331.

3 See eg *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA; *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866, [1956] 1 WLR 936, CA; *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281, CA; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683, [1963] 2 All ER 432, CA.

4 See *UGS Finance Ltd v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep 446 at 453, CA, per Pearson LJ: 'As to the question of 'fundamental breach', I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary, it is a rule of construction based on the presumed intention of the contracting parties. This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exceptions clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally'. As to standard form contracts see para 771 ante.

5 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL (unanimously approving the dictum by Pearson LJ quoted in note 4 supra; on the facts of this case it was held that the demurrage clause in question was not an exclusion clause (see para 799 note 7 ante); all the statements in the case on exclusion clauses may therefore be regarded as obiter dicta; however, the case was nonetheless treated as an authoritative exposition of the law relating to exclusion clauses). It may be possible to support the actual decisions in all of the cases cited in note 3 supra on the construction principle.

6 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL.

7 See eg *Canadian-Dominion Leasing Corp Ltd v George A Welch & Co (O'Connor Office Machines Ltd, third party)* (1983) 33 OR (2d) 826, Ont CA; and see para 798 ante.

8 *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 431, [1966] 2 All ER 61 at 92, HL, per Lord Wilberforce.

9 As to breach entitling the innocent party to treat the contract as repudiated see generally para 989 et seq post.

10 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL.

11 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 432-434, [1966] 2 All ER 61 at 92-93, HL, per Lord Wilberforce. See further para 808 post. The then state of the law may have been responsible for the drafting of the Unfair Contract Terms Act 1977 s 9: see para 812 note 11 post.

12 See *Harbutt's 'Plasticine' Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA; *Farnworth Finance Facilities Ltd v Attryde* [1970] 2 All ER 774, [1970] 1 WLR 1053, CA; *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep 25; *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep 14, CA (contract affirmed).

13 See *Harbutt's 'Plasticine' Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA. See further para 812 post.

14 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 844-845, [1980] 1 All ER 556 at 562-563, HL, per Lord Wilberforce, at 847-850 and 565-567 per Lord Diplock and at 853 and 569 per Lord Salmon.

15 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 845, [1980] 1 All ER 556 at 564, HL, per Lord Wilberforce, at 850-851 and 567-568 per Lord Diplock, and at 853 and 570 per Lord Salmon.

16 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL.

17 Nor, perhaps, will a future English court need to resort to such arguments if it wishes to avoid a swingeing exclusion clause; instead, it may turn to statutory authority: see the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; and para 790 et seq ante; the Unfair Contract Terms Act 1977; and para 820 et seq post.

18 See para 812 post.

## UPDATE

**805-806 Fundamental breach, Construction against exclusion of liability for negligence**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

**805 Fundamental breach**

NOTE 17--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/C. RULES OF CONSTRUCTION/806. Construction against exclusion of liability for negligence.

### **806. Construction against exclusion of liability for negligence.**

Where a contracting party would prima facie be liable for negligence, but seeks to protect himself by relying upon a provision of the contract, then, following the usual rule, the provision will be read contra proferentem<sup>1</sup>. Thus, where he may be subject to liability for negligence and to a stricter form of liability<sup>2</sup> the position is that general words of exclusion will not ordinarily protect him from liability for negligence<sup>3</sup>, but will prima facie be construed so as to protect him only from that stricter form of liability<sup>4</sup>. A similar view is taken of clauses by which one party purports to indemnify the other against the effect of that other's negligence<sup>5</sup>; but this is not the case as regards clauses purporting to transfer vicarious liability for the negligence of an operative from his general employer to a third party<sup>6</sup>.

Where liability for negligence is the only form of liability which would be imposed upon the party seeking the protection of an exclusion clause, the courts will be more ready to construe general words of exclusion as covering negligence<sup>7</sup>. Even in these cases, however, the exclusion clause will not automatically afford protection. On its proper construction in the context of the contract as a whole, it may be merely a warning to the other party against certain risks or contingencies (which even in the absence of an exclusion clause would not be the responsibility of the promisor and for which the promisee may wish to make independent provision) rather than an attempt to exclude or qualify a contractual obligation on the part of the promisor<sup>8</sup>; and hence just drawing attention to the tort rule volenti non fit injuria<sup>9</sup>. Where, however, the provision only seeks to limit liability for negligence, it may be given effect if that is the clear intention<sup>10</sup>; while, where the provision seeks to exclude entirely liability of one of the contracting parties for negligence<sup>11</sup>, the courts have enunciated a series of guidelines<sup>12</sup>:

- 193 (1) if the clause contains language which expressly exempts the proferens (the offeror) from the consequences of the negligence of his own employees, effect must be given to that provision<sup>13</sup>;
- 194 (2) if there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the employees of the proferens<sup>14</sup>. The following phrases have been held sufficient to exclude liability for negligence: 'at sole risk'<sup>15</sup>; 'at customers' sole risk'<sup>16</sup>; 'at owner's risk'<sup>17</sup>; 'at their own risk'<sup>18</sup>; 'no liability whatsoever'<sup>19</sup>; 'under no circumstances'<sup>20</sup>; 'any other loss or damage whatsoever'<sup>21</sup>; 'howsoever caused'<sup>22</sup>; 'arising from any cause whatsoever'<sup>23</sup>; or 'however caused'<sup>24</sup>. However, if a doubt arises at this point, it must be resolved against the proferens<sup>25</sup>;
- 195 (3) if the words used are wide enough for the above purpose, the court must then consider 'whether the head of damage may be based on some ground other than negligence'<sup>26</sup>. The existence of such a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his employees<sup>27</sup>.

1 *John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581, CA. See also *Webster v Higgin* [1948] 2 All ER 127, CA; *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247, [1953] 2 All ER 1409, CA; *Billyack v Leyland Construction Co Ltd* [1968] 1 All ER 783, [1968] 1 WLR 471; and see para 803 ante.

2 See eg in *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA, the defendants, as owners of a hired chattel, were under a prima facie liability for (1) negligence; and (2) breach of warranty, the latter being stricter than the former.

3 That liability may be for breach of a contractual duty to take care, or in the tort of negligence, or both: see para 610 ante.

4 *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA; *Canada Steamship Lines Ltd v R* [1952] AC 192, [1952] 1 All ER 305, PC; *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA; *Westcott v JH Jenner (Plasterers) Ltd and Bovis Ltd* [1962] 1 Lloyd's Rep 309, CA; *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028; *Walters v Whessoe Ltd and Shell Refining Co Ltd* [1968] 2 All ER 816n, CA; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; cf *Coats Paton (Retail) Ltd v Birmingham Corp* (1971) 69 LGR 356 (exclusion clause in local authority inquiry form construed as covering only contractual and not tortious liability, notwithstanding that the level of duty under each head was the same); see further BAILMENT; and cf CARRIAGE AND CARRIERS.

5 *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL. See also *Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd* [1974] 1 Lloyd's Rep 443; *Comyn Ching & Co (London) Ltd v Oriental Tube Co Ltd* [1981] Com LR 67, CA; *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA; *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep 145, CA; *Hancock Shipping Co Ltd v Deacon & Trysail (Pte) Ltd, The Casper Trader* [1991] 2 Lloyd's Rep 550; *EE Caledonia Ltd v Orbit Valve plc* [1995] 1 All ER 174, [1994] 1 WLR 1515, CA. As to the control of such indemnity clauses by the Unfair Contract Terms Act 1977 s 4 see para 824 post.

6 *Arthur White (Contractors) Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586, [1967] 1 WLR 1508, HL; *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA.

7 *Rutter v Palmer* [1922] 2 KB 87, CA; *Forbes, Abbott and Lennard Ltd v Great Western Rly Co* (1927) 44 TLR 97; *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA; *The Ballyalton* [1961] 1 All ER 459, [1961] 1 WLR 929; *Producer Meats (North Island) Ltd v Thomas Borthwick & Sons (Australia) Ltd* [1964] 1 NZLR 700, NZ CA; *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL; *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 2 All ER 957, [1986] 1 WLR 995, HL; *Spriggs v Southeby Parke Bernet & Co Ltd* [1986] 1 Lloyd's Rep 487, CA; *Spencer v Cosmos Air Holidays Ltd* [1989] Abr para 356, CA; *J Lauritzen AS v Wijsmuller BV, The 'Super Servant Two'* [1990] 1 Lloyd's Rep 1, CA. See also *BG Linton Construction Ltd v Canadian National Ry Co* (1974) 49 DLR (3d) 548, Can SC. As to the burden of proving negligence see para 804 ante.

8 *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA (overruling *Turner v Civil Service Supply Association Ltd* [1926] 1 KB 50 and *Fagan v Green and Edwards Ltd* [1926] 1 KB 102); *Olley v Marlborough Court Ltd* [1949] 1 KB 532 at 550, [1949] 1 All ER 127 at 134, CA, obiter per Denning LJ; *Hone v Benson* (1978) 248 Estates Gazette 1013; *Producer Meats (North Island) Ltd v Thomas Borthwick & Sons (Australia) Ltd* [1964] 1 NZLR 700, NZ CA.

9 *McCawley v Furness Rly Co* (1872) LR 8 QB 57; *Buckpitt v Oates* [1968] 1 All ER 1145; *Bennett v Tugwell* [1971] 2 QB 267, [1971] 2 All ER 248; *Birch v Thomas* [1972] 1 All ER 905, [1974] 1 WLR 294, CA. But see *Burnett v British Waterways Board* [1973] 2 All ER 631, [1973] 1 WLR 700, CA. See further the discussion in para 800 note 8 ante. As to control of such clauses by the Unfair Contract Terms Act 1977 s 2(3) see para 822 post.

10 *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101 at 102-103, [1983] 1 WLR 964 at 966, HL, per Lord Wilberforce, and at 105 and 970 per Lord Fraser of Tullybelton; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 814, [1983] 2 All ER 737 at 742, HL, per Lord Bridge of Harwich. See also *Gallaher Ltd v British Road Services Ltd* [1974] 2 Lloyd's Rep 440.

11 See note 3 supra. As to the control of such exclusions by the Unfair Contract Terms Act 1977 s 2 see para 822 post.

12 *Canada Steamship Lines Ltd v R* [1952] AC 192 at 208, [1952] 1 All ER 305 at 310, PC, per Lord Morton. These guidelines have been subsequently applied: see eg *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL; *Lamport and Holt Lines Ltd v Coubro and Scrutton (M and I) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42, CA.

13 *Canada Steamship Lines Ltd v R* [1952] AC 192 at 208, [1952] 1 All ER 305 at 310, PC, per Lord Morton. To fall within this guideline, there should be an explicit reference to 'negligence' or some synonym for it: *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18 at 22, [1978] 1 WLR 165 at 169, HL, per Lord Dilhorne, and at 26 and 173 per Lord Fraser of Tullybelton. Examples of synonyms are to be found in notes 15-24 infra.

14 *Canada Steamship Lines Ltd v R* [1952] AC 192 at 208, [1952] 1 All ER 305 at 310, PC, per Lord Morton. However, even general words, such as 'any liability whatsoever' may be limited by their context: *Smith v South*

*Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL. 'Any loss' may be insufficient, because it may direct attention to the kind of loss, not to its cause or origin: *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; but 'all claims or demands whatsoever' does not admit of this qualification: *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; *Blake v Richards and Wallington Industries Ltd* (1974) 16 KIR 151.

15 *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 All ER 210, [1954] 1 WLR 459, CA; *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 2 All ER 957, [1986] 1 WLR 995, HL; *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA.

16 *Rutter v Palmer* [1922] 2 KB 87, CA.

17 *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA.

18 *Pyman Steamship Co v Hull and Barnsley Rly Co* [1915] 2 KB 729, CA; cf *Hunt and Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 QB 617, [1962] 1 All ER 111, CA.

19 *Swiss Bank Corpn v Brink's-MAT Ltd* [1986] QB 853, [1986] 2 All ER 188.

20 *L Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep 251.

21 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL.

22 *L Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep 251; *White v Blackmore* [1972] 2 QB 651, [1972] 3 All ER 158, CA.

23 *AE Farr Ltd v The Admiralty* [1953] 2 All ER 512, [1953] 1 WLR 965.

24 *The Stella* [1900] P 161; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73; *Pyman Steamship Co v Hull and Barnsley Rly Co* [1915] 2 KB 729, CA; *Reynolds v Boston Deep Sea Fishing and Ice Co Ltd* (1921) 38 TLR 22; *Rutter v Palmer* [1922] 2 KB 87, CA; *Ashby v Tolhurst* [1937] 2 KB 242, [1937] 2 All ER 837, CA; *Jessmore (Owners) v Manchester Ship Canal Co* [1951] 2 Lloyd's Rep 512; *AE Farr Ltd v The Admiralty* [1953] 2 All ER 512, [1953] 1 WLR 965; *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 All ER 210, [1954] 1 WLR 459, CA; *L Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep 251; *Hollins v J Davy Ltd* [1963] 1 QB 844, [1963] 1 All ER 370; *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA.

25 See note 1 supra.

26 *Canada Steamship Lines Ltd v R* [1952] AC 192 at 208, [1952] 1 All ER 305 at 310, PC, per Lord Morton. The other ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it: *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244; cited in *Canada Steamship Lines Ltd v R* supra at 208, 310 per Lord Morton. See also *Lamport and Holt Lines Ltd v Coubro and Scrutton (M and I) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42 at 50, CA, per May LJ: 'In seeking to apply Lord Morton's third test, we should not ask now whether there is or might be a technical alternative head of legal liability which the relevant exemption clause might cover and, if there is, immediately construe the clause as inapplicable to negligence. We should look at the facts and realities of the situation as they did or must be deemed to have presented themselves to the contracting parties at the time the contract was made, and ask to what potential liabilities the one to the other did the parties apply their minds, or must be deemed to have done so'.

27 *Canada Steamship Lines Ltd v R* [1952] AC 192 at 208, [1952] 1 All ER 305 at 310, PC, per Lord Morton. See eg *Olley v Marlborough Court Ltd* [1949] 1 KB 532, [1949] 1 All ER 127, CA; *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA (but see *Lamport and Holt Lines Ltd v Coubro and Scrutton (M and I) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42, CA; *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep 145, CA; *Dorset County Council v Southern Felt Roofing Co* (1990) 6 Const LJ 37, 10 Tr LR 96, CA).

## UPDATE

### 805-806 Fundamental breach, Construction against exclusion of liability for negligence

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.





Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/C. RULES OF CONSTRUCTION/807. Repugnancy.

### 807. Repugnancy.

An exclusion clause may be deprived of effect because of repugnancy to another provision of the contract. This may arise in two ways<sup>1</sup>:

- 196 (1) where the provisions of an exclusion clause are such as to wholly nullify another<sup>2</sup>, positive, clause of the contract, the exclusion clause is to be ignored and unqualified effect given to the other clause<sup>3</sup>;
- 197 (2) where an exclusion clause appears in a printed standard form of contract<sup>4</sup> and there is a conflict between it and another clause written or typed in or otherwise added to the contract, the latter will prevail, since greater weight is given to that which the parties have expressly agreed in detail than to that which appears in the standard form<sup>5</sup>.

Where a term is subject to the statutory reasonableness test<sup>6</sup>, there may be no scope for rejecting it on grounds of repugnancy<sup>7</sup>.

1 See also the principle that an exclusion clause will be so construed as not to be repugnant to the main objects of the contract; and para 808 post. Where there is a conflict between two clauses it may alternatively be possible to say that there is no clear exclusion of liability within the contra proferentem rule: see para 803 ante.

2 The rules of repugnancy have been principally developed in relation to the construction of deeds rather than commercial transactions. The old rule in respect of deeds was that of the two provisions repugnant to each other, that which came first prevailed. That, however, was probably never a rigid rule and is certainly not so today, nor could it realistically be applied to a commercial document. The true principle seems to be that effect is to be given to the real intention of the parties, in which event this rule is really the same as that stated in para 808 post. As to repugnancy in general see *Forbes v Git* [1922] 1 AC 256, PC; and DEEDS AND OTHER INSTRUMENTS. See also *Rose and Frank Co v JR Crompton & Bros Ltd* [1925] AC 445 at 454, HL, per Lord Phillimore.

3 See *Suzuki & Co Ltd v J Beynon & Co Ltd* (1926) 42 TLR 269 at 271, HL, obiter per Viscount Cave LC; *Forbes v Git* [1922] 1 AC 256, PC; *Calico Printers Association Ltd v Barclays Bank* (1931) 36 Com Cas 197 at 212, CA, obiter per Greer LJ; *The Albion, France, Fenwick and Tyne and Wear Co Ltd v Swan, Hunter and Wigham Richardson Ltd* [1953] 2 All ER 679 at 683, [1953] 1 WLR 1026 at 1032, CA, obiter per Somervell LJ; and see *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; cf *Istross Steamship (Owners) v FW Dahlstroem & Co* [1931] 1 KB 247.

An alternative view is that where there is a positive promise in a simple contract followed by a clause nullifying its effect the promise is rendered illusory: *Firestone Tyre and Rubber Co v Vokins & Co Ltd* [1951] 1 Lloyd's Rep 32 at 39 per Devlin J. But see *The Cap Palos* [1921] P 458 at 471, 472, CA, obiter per Atkin LJ ('I am far from saying that a contractor may not make a valid contract that he is not to be liable for any failure to perform his contract, including even wilful default; but he must use very clear words to express that purpose').

4 As to standard form contracts see para 771 ante.

5 See eg *Central Meat Products Co Ltd v JV McDaniel Ltd* [1952] 1 Lloyd's Rep 562; *The Albion, France, Fenwick and Tyne and Wear Co Ltd v Swan, Hunter and Wigham Richardson Ltd* [1953] 2 All ER 679, [1953] 1 WLR 1026, CA; *Neuchatel Asphalte Co Ltd v Barnett* [1957] 1 All ER 362, [1957] 1 WLR 356, CA; *The Brabant* [1967] 1 QB 588, [1966] 1 All ER 961; *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep 17; *A Davies & Co (Shopfitters) Ltd v William Old Ltd* (1969) 113 Sol Jo 262; cf *R Simon & Co Ltd v Peder P Hedegaard AS* [1955] 1 Lloyd's Rep 299 (clause in cif contract inserted by sellers; clause not mentioned in negotiations; contract signed by buyers in ignorance of clause); and see further DEEDS AND OTHER INSTRUMENTS.

6 See para 831 post.

7     *Edmund Murray v BSP International Foundations* (1994) 33 ConLR 1, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/C. RULES OF CONSTRUCTION/808. Construction to serve the purpose or main objects of the contract.

### **808. Construction to serve the purpose or main objects of the contract.**

An exclusion clause will be construed in such a way as to be consistent with the purpose or objects intended to be effected by the contract<sup>1</sup>. One aspect of this is the rule of construction that tends to prevent the contract being interpreted so as to deprive one party's stipulations of all contractual force<sup>2</sup>. The principle, however, goes further than that, so that, for example, in a contract for sale of goods an exclusion clause<sup>3</sup> will not generally protect a seller who delivers goods different in kind from those contracted for. The principle of 'difference in kind' extends further than cases of total and literal difference<sup>4</sup> and covers any case where the defects in the performance are so serious that it can fairly be said that there is a performance totally different from that contemplated by the contract<sup>5</sup>. To take an extreme example of difference in kind, if the seller<sup>6</sup> promises to deliver peas and in fact delivers beans<sup>7</sup> he will be liable notwithstanding a clause excluding all conditions and warranties express or implied<sup>8</sup>, because the delivery of beans is not a breach of condition or warranty but a simple non-performance of the contract<sup>9</sup>. If in such a case the exclusion clause were sufficiently wide in its terms to excuse delivery of beans, three results are possible, depending on the facts: (1) there is no contract at all<sup>10</sup>; or (2) there is an offer of a unilateral contract that the buyer shall pay for such goods as the seller shall in his discretion deliver<sup>11</sup>; or (3) the contract may be one involving alternative performance, whereby the seller must deliver one of the alternatives at his option and the buyer pay for the alternative that is delivered<sup>12</sup>.

It may be that by the application of these principles of difference in kind or non-performance the courts are able to achieve many of the results which were formerly achieved under the doctrine of fundamental breach<sup>13</sup>.

A similar principle operates in contracts involving bailment whereby, if the bailee undertakes to keep goods in a certain place or carry them by a certain route subject to certain exclusion clauses which protect him<sup>14</sup>, and he breaks the contract by not keeping them in the place in which he contracts to keep them, or by carrying them on some route other than that provided for, he cannot rely on the exclusion clauses: they will be so construed as to protect him only when he is carrying out the contract in the manner contracted for<sup>15</sup>. Such situations have most commonly arisen in relation to contracts for the carriage of goods by sea under the so-called deviation rule<sup>16</sup>; but the same principle applies to other contracts involving bailment<sup>17</sup>, such as carriage by land<sup>18</sup>, warehousing contracts<sup>19</sup>, contracts to do work on goods<sup>20</sup>, and hiring<sup>21</sup>. Furthermore, where such a contract allows the person having custody of the goods to depart from the stipulated route<sup>22</sup> or method of storage, that provision, in the absence of a clear indication of contrary intention, will be construed in such a way as to be consistent with the main objects of the contract<sup>23</sup>.

Misdelivery or other loss of goods arising from negligence<sup>24</sup> will not usually be a sufficient departure from the contract to deprive a bailee of the protection of his exclusion clauses<sup>25</sup>; but he will lose its protection if he misdelivers with the knowledge that it is to the wrong person or in an unauthorised manner<sup>26</sup>.

Yet another way of explaining the position may be the so-called 'four corners' rule; that is, that an exemption clause can only protect a promisor whilst he is acting within the 'four corners' of the contract<sup>27</sup>. This may be another way of stating the main object rule<sup>28</sup> or the deviation rule<sup>29</sup>: in any event, it seems merely to pose the question of what was it intended that the promisor should promise<sup>30</sup>.

1 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL.

2 *Tor Line AB v Alltrans Group of Canada Ltd, The TFL Prosperity* [1984] 1 All ER 103 at 111, 112, [1984] 1 WLR 48 at 58-59, HL, per Lord Roskill. See further para 800 ante.

3 In a contract where the exclusion clause is not rendered void or unenforceable by the Unfair Contract Terms Act 1977 s 6: see para 826 post.

4 *Chanter v Hopkins* (1838) 4 M & W 399 at 404, obiter per Lord Abinger CB; *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683 at 709, [1963] 2 All ER 432 at 442, CA, per Upjohn LJ; *UGS Finance Ltd v National Mortgage Bank of Greece and National Bank of Greece* [1964] 1 Lloyd's Rep 446 at 453, CA, obiter per Pearson LJ; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 398, [1966] 2 All ER 61 at 71, HL, per Lord Reid, and at 433 and 93 per Lord Wilberforce.

5 *Pollock & Co v Macrae* 1922 SC 192, HL (marine engines with such serious defects as to be unworkable); cf *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468 (sale of round mahogany logs; shortage in measure and a serious percentage under grade not amounting to performance different in kind); *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866, [1956] 1 WLR 936, CA (hire purchase agreement on car; car delivered in different state); *Tor Line AB v Alltrans Group of Canada Ltd, The TFL Prosperity* [1984] 1 All ER 103, [1984] 1 WLR 48, HL (ship not of dimensions specified in the contract).

The decisions in some of the cases depended in fact on the now discredited view that an exclusion clause could never avail against a fundamental breach (*Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281, CA; *Astley Industrial Trust Ltd v Grimley* [1963] 2 All ER 33, [1963] 1 WLR 584, CA; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 QB 683, [1963] 2 All ER 432, CA; *Farnworth Finance Facilities Ltd v Attryde* [1970] 2 All ER 774, [1970] 1 WLR 1053, CA; *Guarantee Trust of Jersey Ltd v Gardner* (1973) 117 Sol Jo 564, CA); they may, however, have been correctly decided on their facts when considered according to this principle of construction: see para 805 note 4 ante.

6 See note 3 supra.

7 See *Chanter v Hopkins* (1838) 4 M & W 399 at 404 obiter per Lord Abinger CB.

8 As to conditions and warranties see paras 993-994 post; and as to implied terms see para 778 et seq ante.

9 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 433, [1966] 2 All ER 61 at 93, HL, per Lord Wilberforce. In the example given the clause is ineffective quite apart from the fact that the Sale of Goods Act 1979 s 13 makes compliance with description an implied condition of the contract: *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 KB 17, CA; cf *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471, [1953] 1 WLR 1468.

10 See para 798 note 7 ante.

11 See para 800 note 20 ante.

12 As to alternative promises in general see para 925 post.

13 See eg *Farnworth Finance Facilities Ltd v Attryde* [1970] 2 All ER 774, [1970] 1 WLR 1053, CA. For the cases on fundamental breach as a rule of law see para 805 ante.

14 As to standard conditions of inland carriers see CARRIAGE AND CARRIERS vol 7 (2008) PARA 71 et seq; as to standard conditions in contracts of carriage by sea see CARRIAGE AND CARRIERS vol 7 (2008) PARA 71 et seq; and as to standard conditions in carriage by air see CARRIAGE AND CARRIERS vol 7 (2008) PARA 71 et seq.

15 *Lilley v Doubleday* (1881) 7 QBD 510 (though constantly cited in this context, this case does not appear to have involved an exclusion clause; rather, it concerned the 'insurer's' liability imposed upon a bailee who stores goods in an unauthorised place: see para 811 text and note 7 post); *Gibaud v Great Eastern Rly Co* [1921] 2 KB 426, CA; *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, HL; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 412, [1966] 2 All ER 61 at 80, HL, per Lord Hodson, at 424 and at 87 per Lord Upjohn, and at 434 and 93 per Lord Wilberforce; *The Berkshire* [1974] 1 Lloyd's Rep 185. The effect of such departures from the agreed method of performance is considered further in para 811 post.

16 See *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, HL; and para 811 post.

17 It has also been applied to a contract of towage, notwithstanding that such a contract does not involve a bailment: *The Cap Palos* [1921] P 458, CA.

18 See eg *London and North Western Rly Co v Neilson* [1922] 2 AC 263, HL; and CARRIAGE AND CARRIERS vol 7 (2008) PARAS 64, 79, 81. See also *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940 (sub-contracting carriage without authority).

19 See eg *Lilley v Doubleday* (1881) 7 QBD 510; *Kenyon, Son and Craven Ltd v Baxter Hoare & Co Ltd* [1971] 2 All ER 708, [1971] 1 WLR 519; and BAILMENT.

20 *Davies v Collins* [1945] 1 All ER 247, CA; see further BAILMENT.

21 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 915, obiter per Holt CJ.

22 See para 811 post.

23 See *Glynn v Margetson & Co* [1893] AC 351, HL; and CARRIAGE AND CARRIERS.

24 A bailee's liability will usually be based solely upon negligence and accordingly an exclusion clause in general terms will usually protect him: see para 806 ante; but cf *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA.

25 *Hollins v J Davy Ltd* [1963] 1 QB 844, [1963] 1 All ER 370; *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA.

26 *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442; *Sze Hai Tong Bank Ltd Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, PC. See also para 809 post.

27 *Alderslade v Hendon Laundry Ltd* [1945] KB 189 at 192, [1945] 1 All ER 244 at 245, CA; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 at 127, [1956] 1 WLR 461 at 469, CA; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 412, [1966] 2 All ER 61 at 80, HL, per Lord Hodson, at 424 and 87 per Lord Wilberforce, and at 434 and 93 per Lord Wilberforce; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69, [1977] 3 All ER 498, CA. See also *The Cap Palos* [1921] P 458, CA.

28 See note 1 supra.

29 See para 811 post.

30 *Wibau Maschinenfabrik Hartman SA v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494 at 505 per Hirst J. Thus it may be seen as not establishing any separate general 'four corners' principle: *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155 at 162 per Leggatt J.

## UPDATE

### 808 Construction to serve the purpose or main objects of the contract

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/C. RULES OF CONSTRUCTION/809. Deliberate breaches.

### 809. Deliberate breaches.

At one time, it was suggested that, if a breach of contract was deliberate, it would not be covered by an exclusion clause<sup>1</sup>. However, it is now settled that there is no rule of law to the effect that a deliberate breach of contract necessarily falls as a matter of construction outside the scope of an exclusion clause or in some way deprives a party of the protection of such a clause<sup>2</sup>. However, the fact that the breach was deliberate may be a very important factor. In certain circumstances, on the proper construction of the contract, the court may hold that the exclusion clause was never intended to apply to such a breach<sup>3</sup>; or that the breach constitutes a repudiation<sup>4</sup> entitling the other party to be discharged from further obligation under the contract<sup>5</sup>. However, to create a special rule for deliberate acts is unnecessary and may lead astray<sup>6</sup>.

When the doctrine of fundamental breach was regarded as a rule of substantive law<sup>7</sup> it was suggested that, except perhaps in the case of serious defects in goods, a fundamental breach could only be committed by intentional conduct, recklessness or perhaps gross negligence, but not by ordinary negligence<sup>8</sup>; but the correct approach would appear to be to inquire whether the exclusion clause is wide enough, as a matter of construction, to cover a negligent breach of contract<sup>9</sup>; if it is, and there has been misconduct going beyond mere negligence, the further inquiry will have to be made whether the clause is wide enough to cover that misconduct<sup>10</sup>.

1 *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442; *The Albion, France, Fenwick and Tyne and Wear Co Ltd v Swan Hunter and Wigham Richardson Ltd* [1953] 2 All ER 679 at 682, [1953] 1 WLR 1026 at 1030, CA, per Somervell LJ; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, PC.

2 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 435, [1966] 2 All ER 61 at 94, HL, per Lord Wilberforce; disapproving dicta in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, PC. See also *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1989] LRC (Comm) 527, PC.

3 'This is not to say that 'deliberation' may not be a relevant factor; depending on what the party in breach 'deliberately' intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited': *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 435, [1966] 2 All ER 61 at 94, HL, per Lord Wilberforce.

4 As to repudiation see paras 997-1001 post.

5 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 394, [1966] 2 All ER 61 at 68-69, HL, per Viscount Dilhorne, at 429 and at 90 per Lord Upjohn and at 435 and 94 per Lord Wilberforce; *The Cap Palos* [1921] P 458 at 472-473, CA, per Atkin LJ.

6 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 435, [1966] 2 All ER 61 at 94, HL, per Lord Wilberforce.

7 This is no longer the case: see para 805 ante.

8 *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, PC; *AF Colverd & Co Ltd v Anglo Overseas Transport Co Ltd and Pope & Sons* [1961] 2 Lloyd's Rep 352; *Alexander and Alexander v City Line Ltd* [1964] 1 Lloyd's Rep 84; *John Carter (Fine Worsted) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA; *Gillette Industries Ltd v WH Martin Ltd* [1966] 1 Lloyd's Rep 57, CA.

9 See para 806 ante.

10 Some standard form clauses, while excluding liability for negligence (see para 806 ante), accept liability for 'wilful neglect or default': see *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, CA; *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Export)* [1988] 2 Lloyd's Rep 427, CA.

## **UPDATE**

### **809 Deliberate breaches**

NOTE 3--See also *Internet Broadcasting Corpn v MAR LLC (t/a MARHedge)* [2009] EWHC 844 (Ch), [2009] 2 Lloyd's Rep 295, [2009] All ER (D) 177 (Apr).

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## **D. EFFECT OF BREACH ON EXCLUSION CLAUSES**

### **810. General rule.**

An exclusion clause may seek to exclude or qualify the primary obligation in the contract which is alleged to have been broken; in other words, it may seek to prevent what would otherwise be a breach from being a breach at all<sup>1</sup>. In such a case, the only question is one of construction; it is to discover whether the defendant's conduct is within the scope of the protection of the exclusion clause<sup>2</sup>. If it is within that protection<sup>3</sup>, that is no breach at all and no further question can arise as to the defendant's liability<sup>4</sup>; but, if it is outside that protection, the clause can have no effect, whether or not the innocent party rescinds the contract<sup>5</sup>.

Alternatively, an exclusion clause may simply seek to limit or qualify rights of the innocent party upon a breach without altering the fact that the conduct of the other party amounts to a breach<sup>6</sup>. Again, the first step, according to general principles, must be to ask whether the clause is wide enough, on its proper construction<sup>7</sup>, to have a limiting effect on the innocent party's rights in case of breach. If it is sufficiently wide<sup>8</sup>, the clause should take effect, and it should make no difference whether the innocent party rescinds or affirms the contract<sup>9</sup>. The result of rescission for breach is not to destroy the contract *ab initio*<sup>10</sup>, nor even normally to put an end to it from the moment the election to rescind is communicated<sup>11</sup>; and since a breach of contract can only take place before rescission the breach must be governed by the exclusion clause<sup>12</sup>. Of course, consequences of the breach may occur after the breach and the innocent party will usually be able to recover damages for them<sup>13</sup>, but even these consequences must be governed by the exclusion clause<sup>14</sup>. However, the party in breach might, after rescission of the contract, continue for example to hold the innocent party's goods on a simple bailment or some other non-contractual basis, and he would then not be protected by exclusion clauses in the discharged contract in respect of damage to the goods after rescission<sup>15</sup>.

Similarly, if the exclusion clause is not wide enough to have a limiting effect upon the innocent party's right of action for breach, it should be ignored as being inapplicable to the situation in question. Furthermore, it should again make no difference to the issue whether the innocent party rescinds or affirms as a result of the breach. It is unnecessary for him to rescind in order to escape the effects of such an exclusion clause; and, merely because he affirms, he does not in any way necessarily waive or qualify his right to damages in respect of past breaches<sup>16</sup>.

Notwithstanding the above principles, deviation cases appear to be subjected to a somewhat different analysis<sup>17</sup>, and there is authority that the same is true of cases of fundamental breach<sup>18</sup>.

1 See para 798 ante.

2 'An act which, apart from the exceptions clause, might be a breach sufficiently serious to justify refusal of further performance, may be reduced in effect, or made not a breach at all, by the terms of the clause': *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[1967] 1 AC 361 at 431, [1966] 2 All ER 61 at 92, HL, per Lord Wilberforce; *The Angelia*[1973] 2 All ER 144 at 162-164, [1973] 1 WLR 210 at 230-232, obiter per Kerr J.

3 See paras 803-809 ante.

4 See *Photo Production Ltd v Securicor Transport Ltd*[1980] AC 827, [1980] 1 All ER 556, HL. But the contract might be frustrated: see para 905 post.



5 Cf *Charterhouse Credit Co Ltd v Tolly*[1963] 2 QB 683, [1963] 2 All ER 432, CA, where the hirer affirmed the contract but the owner still could not rely on the exclusion clause. That decision, although tainted with the view that fundamental breach was a rule of substantive law (see para 805 ante), may be correct simply on the basis that as a matter of construction the clause was not apt to cover the breach in question: *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[1967] 1 AC 361 at 428, [1966] 2 All ER 61 at 90, HL, per Lord Upjohn and at 433 and 93 per Lord Wilberforce. As to rescission for breach and affirmation see paras 989, 1002-1011 post.

6 See para 798 ante. Such was the clause in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*[1983] 2 AC 803, [1983] 2 All ER 737, HL (loss limited to refund of price).

7 See paras 803-809 ante.

8 See note 2 supra.

9 As to rescission de futuro for breach and affirmation see paras 989, 1002-1011 post.

10 *Buckland v Farmer and Moody*[1978] 3 All ER 929, [1979] 1 WLR 221, CA; and see para 986 note 10 post.

11 Thus the contract certainly remains in existence to the extent: (1) of allowing claims for damages for breach before the contract is discharged (*Hirji Mulji v Cheong Yue Steamship Co Ltd*[1926] AC 497 at 510, PC; *Moschi v Lep Air Services Ltd*[1973] AC 33, [1972] 2 All ER 393, HL), though the promisor's obligation then becomes a 'secondary' one to pay damages; (2) that an arbitration or time-limit clause in the contract may remain in effect (*Heyman v Darwins Ltd*[1942] AC 356, [1942] 1 All ER 337, HL; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star*[1980] 3 All ER 257, [1981] 1 WLR 138, PC); and (3) of allowing damages for subsequent breaches (see para 1002 post).

12 *Photo Production Ltd v Securicor Transport Ltd*[1980] AC 827, [1980] 1 All ER 556, HL; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*[1983] 2 AC 803, [1983] 2 All ER 737, HL.

13 The assessment of damages for breach of contract is governed by what was in the contemplation of the parties at the time when the contract was made, but it is clear that the rule whereby damages may be recovered for any consequences which according to this criterion were 'not unlikely' to occur (see *Koufos v C Czarnikow Ltd*[1969] 1 AC 350, [1967] 3 All ER 686, HL; and DAMAGES) is subject to any contrary agreement of the parties; see *Koufos v C Czarnikow Ltd* supra at 413 and at 709-710 per Lord Pearce ('In the case of contract two parties, usually with some knowledge of one another, deliberately undertake mutual duties. They have the opportunity to define clearly in respect of what they shall and shall not be liable. The law has to say what shall be the boundaries of their liability where this is not expressed, defining that boundary in relation to what has been expressed or implied'); see also *The Heron II*[1966] 2 QB 695 at 731, [1966] 2 All ER 593 at 605, CA, per Diplock LJ.

14 As a promissory stipulation in the contract survives discharge by rescission de futuro to the extent of allowing a claim for damages (see note 11 supra), so also does a limitation of liability clause survive for the purpose of measuring damages for that breach: *Photo Production Ltd v Securicor Transport Ltd*[1980] AC 827, [1980] 1 All ER 556, HL; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*[1983] 2 AC 803, [1983] 2 All ER 737, HL.

15 Cf the explanation by Lord Reid of the deviation cases (see para 811 post) in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[1967] 1 AC 361 at 399-400, [1966] 2 All ER 61 at 71-72, HL.

16 See *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[1967] 1 AC 361 at 398-399, [1966] 2 All ER 61 at 71, HL, per Lord Reid: 'As a matter of construction it may be that the terms of the exclusion clause are not wide enough to cover the kind of breach which has been committed ... Then the true analysis seems to me to be that the whole contract, including the clause excluding liability, does survive after election to affirm it, but that does not avail the party in breach. The exclusion clause does not change its meaning: as a matter of construction it never did apply and does not after election apply to this type of breach, and therefore is no answer to an action brought in respect of this type of breach.'

17 See para 811 post.

18 See para 812 post.

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### 811. Deviation.

Though it has been said that they depend not upon any special rules but upon the general law of contract<sup>1</sup>, cases of deviation<sup>2</sup> in contracts involving bailment<sup>3</sup> appear to be dealt with according to principles which do not coincide at all points with the general law of discharge by breach<sup>4</sup>; and the deviation cases may be *sui generis*<sup>5</sup>. These special principles, which apply unless otherwise agreed<sup>6</sup>, are set out below.

Any deviation from the agreed route or place of storage deprives the party having custody of the goods of the benefit of his exclusion clauses<sup>7</sup>. Indeed, the law goes further and then imposes upon him what is virtually the liability of an insurer<sup>8</sup>.

The above result is reached not merely<sup>9</sup> because as a matter of construction the exclusion clause is held not to cover the deviation, but by application of the principle of discharge by breach: the deviation is treated as a breach going to the root of the contract and entitling the innocent party to rescind<sup>10</sup>; and where, as will commonly be the case, the innocent party only discovers the deviation after the loss has occurred, his rescission will date back to the time of deviation<sup>11</sup>.

If, after a deviation, the innocent party chooses to affirm the contract, the affirmation relates back to the time of deviation so that the protection of the exclusion clauses is retrospectively restored to the guilty party during the deviation<sup>12</sup>.

However, any provision in the contract allowing deviation by the bailee will be restrictively construed<sup>13</sup>. Further, a shipowner can probably rely on exceptions in a contract of carriage in respect of losses occurring before a deviation, because the reason for the rule in respect of deviation lies in the fact that the cargo owner's insurance policy may be avoided, but only from the time of deviation, and rights until then accrued in the policy are not affected<sup>14</sup>.

1 *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597 at 601, HL, per Lord Atkin, at 608 per Lord Wright MR, and at 614 per Lord Maugham; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 399, [1966] 2 All ER 61 at 72, HL, per Lord Reid and at 423 and 88 per Lord Upjohn.

2 In certain circumstances (eg for the saving of life or through the stress of weather) deviation is permitted without depriving the shipowner of the benefit of his exceptions: see *Scaramanga & Co v Stamp* (1880) 5 CPD 295, CA; and CARRIAGE AND CARRIERS.

3 See para 808 ante.

4 See paras 810 ante, 986, 1002-1011 post.

5 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 845, [1980] 1 All ER 556 at 563, HL, per Lord Wilberforce.

6 Such 'liberty to deviate' clauses are common in contracts for the carriage of goods by sea: see generally *Cunard Steamship Co Ltd v Buerger* [1927] AC 1, HL; and CARRIAGE AND CARRIERS.

7 See eg *Cunard Steamship Co Ltd v Buerger* [1927] AC 1, HL; and CARRIAGE AND CARRIERS; *Gibaud v Great Eastern Rly Co* [1921] 2 KB 426, CA; and BAILMENT.

8 Thus in the case of carriage by sea the deviating shipowner is liable for any loss unless he can show that it must have occurred even if there had been no deviation: see *James Morrison & Co Ltd v Shaw, Savill and Albion Co Ltd* [1916] 2 KB 783, CA; and CARRIAGE AND CARRIERS. A bailee of goods who deviates will be liable for any loss

unless he can show that it arose from causes independent of his acts or inherent in the goods themselves: see *Davis v Garrett* (1830) 6 Bing 716; and BAILMENT.

9 Though the cases may equally be regarded as examples of the rule of construction: *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 433, 434, [1966] 2 All ER 61 at 93, HL, per Lord Wilberforce.

10 *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, HL; *Woolf v Collis Removal Service* [1948] 1 KB 11, [1947] 2 All ER 260, CA; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 426, [1966] 2 All ER 61 at 88, HL, per Lord Upjohn. The fact that the contract is discharged is demonstrated by the rule that the deviating shipowner may not recover the contract freight even though no loss occurs, though he may be able to recover on a quantum meruit claim: see *Hain Steamship Co Ltd v Tate and Lyle Ltd* supra; and CARRIAGE AND CARRIERS.

11 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 399, 400, [1966] 2 All ER 61 at 72, HL, per Lord Reid (who regarded the doctrine of relation back as 'the special feature of deviation cases').

12 *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, HL; and see further CARRIAGE AND CARRIERS.

13 *Leduc & Co v Ward* (1888) 20 QBD 475, CA; *Glynn v Margetson & Co* [1893] AC 351, HL; *Connolly Shaw Ltd v A/S Det Nordenfjeldske D/S* (1934) 49 Ll L Rep 183. For example, a clause providing 'the responsibility of the carrier shall be deemed to cease absolutely after the goods are discharged from the ship' did not cover misdelivery to a stranger: *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, PC; cf *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd, The Antwerpen* [1994] 1 Lloyd's Rep 213, NSW SC.

14 *Carver Carriage by Sea* (12th Edn) 631-632; contra Scrutton *Charterparties* (20th Edn, 1996) p 259; and *Internationale Guano en Superphosphaat-Werken v Robert Macandrew & Co* [1909] 2 KB 360 at 365, obiter per Pickford J.

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### **812. Effect of a fundamental breach.**

It has already been seen that in the case of the most serious breaches of contract, fundamental breaches, it used to be the case that an exclusion clause could not as a matter of law protect the promisor; but, it has now been settled that, whether the promisee purports to rescind or affirm, the effect of the exclusion clause is a matter of construction<sup>1</sup>. It is, therefore, possible that despite what would prima facie amount to a fundamental breach entitling the promisee to rescind, the exclusion clause renders it no breach at all, so that the contract continues to bind both parties<sup>2</sup>.

Nevertheless, the effects of the prima facie fundamental breach may be so catastrophic as to bring the contract automatically to an end<sup>3</sup>; and this would appear to have happened in the same events as would ordinarily frustrate the contract, so that it might be appropriate to term it a 'frustrating breach'<sup>4</sup>. Of course, the doctrine of frustration cannot then be applicable, because the promisor caused the event<sup>5</sup>; but, where the exclusion clause renders the promisor's act no breach at all, it would seem that the primary obligations under the contract<sup>6</sup> terminate automatically<sup>7</sup>. However, unlike in the case of frustration<sup>8</sup>, the secondary obligations of the parties to pay damages for frustrating breach of contract continue<sup>9</sup>. At common law, these claims would be subject to the provisions of the exclusion clause<sup>10</sup>, but statute makes it clear that the exclusion clause remains subject to the statutory reasonableness test<sup>11</sup>, whether the contract has been terminated<sup>12</sup>, or not<sup>13</sup>.

1 See paras 805 ante, 996 post.

2 See para 810 ante.

3 See eg *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA (see further note 7 infra); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL (see further note 12 infra).

4 See para 900 et seq post.

5 This would amount to self-induced frustration: see para 899 post.

6 See para 1002 note 1 post.

7 *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA (the breach in this case consisted of specifying and installing inadequate materials in a heating system and leaving the machinery energised and unattended at night, with the result that a fire destroyed the plaintiff's factory; but see note 12 infra); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL (employee of security firm set a small fire, which got out of control and burned down the factory).

8 See para 909 et seq post.

9 See para 1012 post.

10 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL. See para 810 ante.

11 See the Unfair Contract Terms Act 1977 s 11; and para 831 post.

12 See *ibid* s 9(1); and para 829 post. This provision effectively reverses the decision in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA (where it was held that the exclusion clause ended automatically on the breach, so that the promisor could not rely on it to limit the

damages payable). The reasoning in this case was always difficult to accept: ex hypothesi the breach was committed before the discharge of the contract. On this basis it is difficult to see why the exclusion clause (which was a limitation of damages clause and which was held as a matter of construction to cover the breach) did not protect the defendants. Thus in *Mayfair Photographic Supplies (London) Ltd v Baxter, Hoare & Co Ltd and Stembidge* [1972] 1 Lloyd's Rep 410 at 416 MacKenna J explained: 'If it had been necessary for me to apply the decision of the Court of Appeal in *Harbutt's Plasticine* I should have had great difficulty in discovering a ratio decidendi which could be reconciled with the decisions in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL; and *Heyman v Darwins Ltd* [1942] AC 356, [1942] 1 All ER 337, HL'.

However, it has been said that *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* supra may correctly be seen as a case analogous to deviation (see para 811 ante): *Kenyon, Son and Craven Ltd v Baxter, Hoare & Co Ltd* [1971] 2 All ER 708 at 718, [1971] 1 WLR 519 at 530 per Donaldson J. Alternatively, it may be said that in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* supra there was a performance totally different (in kind) from that contemplated by the contract: *Kenyon, Son and Craven Ltd v Baxter, Hoare & Co Ltd* supra at 719, 531 per Donaldson J; citing *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* supra at 431 and 91 per Lord Wilberforce. That, however, is difficult to reconcile with the facts of the case and with the fact that the Court of Appeal considered that as a matter of construction the exclusion clause applied.

Since the coming into force of the Unfair Contract Terms Act 1977, notwithstanding a frustrating breach, an aptly expressed exclusion clause may continue to govern the secondary rights of the parties: see para 805 ante.

13 See *ibid* s 9(2); and para 829 post. This affirms the common law that, where the promisee elects to affirm the contract after breach, the effect of an exclusion clause is a matter of construction: see para 805 ante.

## UPDATE

### 812 Effect of a fundamental breach

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **E. EXCLUSION CLAUSES AND THIRD PARTIES**

### **(A) IN GENERAL**

#### **813. Rights and duties in contract and tort.**

An exclusion clause will sometimes purport to affect a person who is not, or appears not to be, a party to the contract containing the clause. It may purport to benefit him<sup>1</sup>, or to impose a burden on him by depriving him of rights which he would otherwise possess against one of the contracting parties<sup>2</sup>. At common law, the general privity principle is that a contractual provision as between A and B cannot affect a third party (C). Consequently, C cannot take the benefit of that contractual provision<sup>3</sup>, nor can C be subject to the burden of it<sup>4</sup>. This problem can only arise when the rights or duties of C which are affected by the clause are founded in tort<sup>5</sup>, for example the liability for negligence imposed upon a person handling the goods of another<sup>6</sup>.

However, there are a number of exceptional ways in which C may enjoy the benefit or take the burden of a contract between A and B. First, C may actually be a party to the contract between A and B, as by the doctrine of agency<sup>7</sup>; or he may be a party to some other contract containing the same term<sup>8</sup>. Secondly, C may be within one of the exceptions to the privity rule<sup>9</sup>: there may be a relevant common law exception, as where there is a sub-bailment<sup>10</sup> or sub-contractor<sup>11</sup>; or an equitable exception, as perhaps where B has created a trust of an exemption clause in favour of C<sup>12</sup>; or a statutory exception, as where a stay of proceedings may be sought of an agreement not to sue<sup>13</sup>. Thirdly, a contractual provision known to C may protect B against C's tort claim by way of the doctrine of *volenti non fit injuria*<sup>14</sup>.

1 Eg C may be an employee, agent or sub-contractor: see paras 814-816 post.

2 Eg imposing an obligation of performance: see para 818 post.

3 See para 749 ante.

4 See para 750 ante.

5 If the rights or duties of the 'third party' sound only in contract they cannot exist at all unless he is a party to the contract or to some collateral contract (or can bring himself within one of the exceptions to the doctrine of privity: see para 754 et seq ante). If he is a party to the contract, his rights or duties will, of course, be qualified by the exclusion clause subject to the general rules of construction governing such clauses (as to which see paras 803-809 ante). As to assignment of contracts see generally CHOSER IN ACTION vol 13 (2009) PARAS 6, 13 et seq. See also the Carriage of Goods by Sea Act 1924; and CARRIAGE AND CARRIERS.

6 See eg *Scruttons Ltd v Midland Silicones Ltd*[1962] AC 446, [1962] 1 All ER 1, HL (negligence of stevedores in unloading goods); and para 814 post; *Fosbrooke-Hobbes v Airwork Ltd and British American Air Services Ltd*[1937] 1 All ER 108 (guest of charterer of aircraft injured in crash; charter containing exclusion clause); and para 818 post. Cf *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*[1975] AC 154, [1974] 1 All ER 1015, PC; see para 816 note 8 post.

Examples in relation to unsuccessful attempts to confer the benefit of an exclusion clause in the tort of negligence include: a clause protecting bus crew against a claim by the passengers (*Cosgrove v Horsfall* (1945) 62 TLR 140, CA; *Genys v Matthews*[1965] 3 All ER 24, [1966] 1 WLR 758, Liverpool Court of Passage); a ship's boatswain and master against a passenger (*Adler v Dickson*[1955] 1 QB 158, [1954] 3 All ER 397, CA); a stevedore against the owner of shipped goods (*Scruttons Ltd v Midland Silicones Ltd*[1962] AC 446, [1962] 1 All ER 1, HL; *Canadian General Electric Co Ltd v The Lake Bosomtwe* [1970] 2 Lloyd's Rep 81, Can SC; *The Suleyman Stalskiy* [1976] 2 Lloyd's Rep 609, Can SC; *Lummus Co Ltd v East African Harbours Corp*n [1978] 1

Lloyd's Rep 317, Kenya HC; *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155); and a claim of vicarious immunity (see para 814 post).

7 See para 816 post; and AGENCY vol 1 (2008) PARA 1 et seq.

8 See para 815 post. The third party may, of course, safeguard his position by an indemnity provision in the contract between him and one of the contracting parties: see para 749 note 9 ante. Indemnity clauses are construed like exclusion clauses: see para 806 note 5 ante.

9 See para 754 et seq ante.

10 See para 817 post.

11 See para 747 ante.

12 See para 761 note 13 ante.

13 See para 763 note 14 ante.

14 See paras 800 note 8, 806 note 9 ante.

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## (B) BENEFIT OF AN EXCLUSION CLAUSE

### 814. No doctrine of vicarious immunity.

Despite some earlier suggestions to the contrary<sup>1</sup>, where the performance or part of the performance of a contract between A and B is to be, or may be, carried out by C and the contract contains an exclusion clause excluding or limiting the liability of B, C cannot as a general rule<sup>2</sup> rely upon the protection of the clause in respect of any liability in tort he may incur to A during the performance of the contract<sup>3</sup>. That both parties to the contract actually contemplated C's participation is not sufficient to bring C within the protection of the clause<sup>4</sup>; nor is the fact that C is named in the contract as a person intended to benefit from the clause<sup>5</sup>, unless he can obtain that benefit by performing services for one of the parties which are necessary for the fulfilment of that party's obligations under the contract<sup>6</sup>. Nor will it usually be possible for B in such a case to seek a stay of the action against C on the ground that it would be a fraud on B<sup>7</sup>.

However, it may be possible to achieve a similar result indirectly, by way of a circular chain of indemnity contracts<sup>8</sup>.

1 The doctrine of vicarious immunity was believed to have been laid down in *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co*[1924] AC 522, HL (bill of lading purported to exempt both the charterers (A) and the shipowners (C) from loss due to bad stowage. When sued by the cargo owners (B), it was held that C was so exempted). Although several of the speeches in that case supported the so-called doctrine of vicarious immunity, the exact grounds of C's exemption was not clear. In *Scruttons Ltd v Midland Silicones Ltd*[1962] AC 446, [1962] 1 All ER 1, HL, it was denied that there existed a doctrine of vicarious immunity (see note 3 infra). However, it would seem that the actual decision in *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co* supra can still be supported either on the basis of implied contract (see para 815 post) or agency (see para 816 post): see *The Mahkuta*[1996] AC 650, [1996] 3 All ER 502, PC.

2 For exceptional cases see paras 815-816 post; and see para 813 note 5 ante.

3 *Scruttons Ltd v Midland Silicones Ltd*[1962] AC 446, [1962] 1 All ER 1, HL, disapproving dicta of Scrutton J in *Mersey Shipping and Transport Co Ltd v Rea Ltd* (1925) 21 Ll L Rep 375 at 378, CA. See also *Krawill Machinery Corp v Robert C Herd & Co Inc* [1959] 1 Lloyd's Rep 305 (USA SC); *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd's Rep 346 (Aust HC) (similar cases). The contract in *Scruttons Ltd v Midland Silicones Ltd* supra incorporated the provisions of a United States Act which limited the liability of the 'carrier' but not that of the stevedores. Cf the Hague-Visby Rules art IV bis r 2 (contained in the Carriage of Goods by Sea Act 1971 s 1(2), Schedule (as amended)); see further CARRIAGE AND CARRIERS vol 7 (2008) PARA 398. Cf the Carriage by Air Act 1961 s 1(1) (as amended), Sch 1 art 25A; see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 121, 154 et seq. For criticism of the consequences of the basic rule see *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd*[1973] QB 400 at 412, [1973] 1 All ER 193 at 198, CA, obiter per Lord Denning MR.

4 *Adler v Dickson*[1955] 1 QB 158, [1954] 3 All ER 397, CA.

5 *Scruttons Ltd v Midland Silicones Ltd*[1962] AC 446, [1962] 1 All ER 1, HL (obiter, since the contract did not in fact name the stevedores; see note 3 supra). The same principles apply to a licence or free pass: *Cosgrove v Horsfall* (1945) 62 TLR 140, CA; *Genys v Matthews*[1965] 3 All ER 24, [1966] 1 WLR 758, Liverpool Court of Passage. A free pass subject to conditions may amount to a contract: *Gore v Van der Lann*[1967] 2 QB 31, [1967] 1 All ER 360, CA; but cf *Wilkie v London Passenger Transport Board*[1947] 1 All ER 258, CA; *Mayor v Ribble Motor Services*(1958) Times, 16 October, CA; *White v Blackmore*[1972] 2 QB 651, [1972] 3 All ER 158, CA.

6 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*[1975] AC 154, [1974] 1 All ER 1015, PC; and see para 816 note 7 post.



7 In *Gore v Van der Lann*[1967] 2 QB 31, [1967] 1 All ER 360, CA, the defendant's employers sought a stay of proceedings under the Supreme Court of Judicature (Consolidation) Act 1925 s 41 (repealed) (see now the Supreme Court Act 1981 s 49(3); para 763 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 533). It was held that they did not have sufficient interest to do so as they were under no obligation to indemnify the defendant. It is open to doubt whether an application to stay proceedings would succeed if the plaintiff had by a binding contract promised the employers that she would not sue the defendant, for it would seem that in the absence of a duty to indemnify the defendant, no damage would be done to the employers by the plaintiff's breach of this promise: cf *Gore v Van der Lann* supra at 45 and 368, CA, per Salmon LJ.

8 See para 815 note 1 post.

## **UPDATE**

### **814 No doctrine of vicarious immunity**

NOTE 7--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### **815. Express or implied contract with third party.**

There are several ways in which the general rule stated in the previous paragraph may be side-stepped.

The carrier (A) may expressly grant the sub-contractor (C) by way of collateral contract an enforceable indemnity against action by the goods owner (B) and then contract with B that B will not sue C<sup>1</sup>: it would seem that A could enforce B's promise by obtaining a stay of execution<sup>2</sup>.

In some circumstances, even in the absence of such an express provision, the correct interpretation of the facts may be that there is an implied collateral contract between C and B, which includes in its terms the exclusion clause in the main contract between A and B<sup>3</sup>.

A variation on the above has A in contracting for the carriage of B's goods as acting also as agent for C<sup>4</sup>, or possibly as his trustee<sup>5</sup>.

1 'If A wishing to protect X, gives to X an enforceable indemnity, and contracts with B that B will not sue X, informing B of the indemnity, and then B does sue X in breach of his contract with A, it may be that A can recover from B as damages the sum which he has to pay X under the indemnity, X having had to pay it to B': *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 473, [1962] 1 All ER 1 at 10, HL, per Lord Reid. As to collateral contracts see para 753 ante.

2 'le a stay of execution under the Supreme Court Act 1981 s 49: see *Nippon Yusen Kaisha v International Import and Export Co Ltd, The Elbe Maru* [1978] 1 Lloyd's Rep 206; and para 763 note 14 ante.

3 *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co* [1924] AC 522, HL (as explained in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; charterers damaged shipper's goods through bad stowage; exclusion clause in bill of lading between charterers and shipper also protected shipowner); *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, [1954] 2 All ER 158 (sale of fire engine fob London; delivered by sellers alongside ship nominated by buyers; engine damaged before crossing ship's rail; shipowners entitled to limit their liability against the sellers on the same basis as contract of affreightment between shipowners and buyers); *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 729, [1965] 2 All ER 725 at 734, CA, obiter per Lord Denning MR (owner of fur deposited for cleaning with furrier bound by usual terms of trade when fur sent to third party for cleaning). The last two cases involve seeking to impose on a third party the burden of an exclusion clause between two contracting parties: see para 818 post. As to collateral contracts see para 753 ante.

4 *Hollingworth v Southern Ferries, The Eagle* [1977] 2 Lloyd's Rep 70; and see para 816 post.

5 It has been suggested that the concept of a trust might be called in aid to provide the benefit of an exclusion clause for a third party, but this seems unlikely. As to trusts of promises see para 761 ante.

## **UPDATE**

### **815 Express or implied contract with third party**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(ii) Exclusion Clauses and the Common Law/E. EXCLUSION CLAUSES AND THIRD PARTIES/(B) Benefit of an Exclusion Clause/816. Creation of contract with third party by agency.

### **816. Creation of contract with third party by agency.**

Another possibility whereby a third party (C) might be able to rely upon an exclusion clause has been suggested on the basis<sup>1</sup> that one of the parties to the contract (A) acts as the agent of C to make him a party to the contract<sup>2</sup>, at least in so far as it excludes C's liability<sup>3</sup>. The suggestion has been successfully applied to confer on a stevedore (C) the protection of a bill of lading<sup>4</sup> and on a road carrier sub-bailee (C) the benefit of the consignment note<sup>5</sup>; but the doctrine has been resisted in other cases<sup>6</sup>.

It seems that as a minimum all the following conditions must be satisfied to make out such a contract by agency<sup>7</sup>: (1) the contract between A and B makes it clear that the third party, C, is intended to be protected by the provisions in it excluding or limiting liability<sup>8</sup>; (2) that contract makes it clear that A, in addition to contracting for these exclusion clauses on his own behalf, is also contracting as agent for C<sup>9</sup>; (3) A has authority<sup>10</sup> from C so to contract, though later ratification<sup>11</sup> may suffice; and (4) C must give consideration to B<sup>12</sup>.

1 This seems to be the principle of the 'through carriage' railway cases: see eg *Gill v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 QB 186. The contracting railway company has been treated either as the agent of the passenger or consignor to contract with other railways (*Hall v North Eastern Rly Co* (1875) LR 10 QB 437 at 442); or as the latter's agent to contract with the passenger/consignor (*Barratt v Great Northern Rly Co* (1904) 20 TLR 175, DC).

2 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 466, [1962] 1 All ER 1 at 6, HL, per Viscount Simonds, at 474 and at 10 per Lord Reid and at 495 and 24-25 per Lord Morris; *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC; *Carle and Montanari Inc v American Export Isbrandtsen Lines Inc and John W McGrath Corp* [1968] 1 Lloyd's Rep 260 (US District Court); see also *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA; *The Kirknes* [1957] P 51, [1957] 1 All ER 97. As to agency see para 755 ante.

3 Clauses so attempting to achieve protection for C have also been found in conditions of contract published by railways, repairers and building contractors. The courts have refused to treat on the same basis a clause for the benefit of both parties: see *The Mahkutai* [1996] AC 650, [1996] 3 All ER 502, PC (exclusive jurisdiction clause).

4 *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257, [1981] 1 WLR 138, PC; *Godina v Patrick Operations Pty Ltd* [1984] 1 Lloyd's Rep 333, NSW CA. To affect the consignee it would be necessary to apply the statutory exception noted in para 763 head (6) ante.

5 *Celthene Pty Ltd v WKJ Hauliers Pty Ltd* [1981] 1 NSWLR 606, SC.

6 *Southern Water Authority v Carey* [1985] 2 All ER 1077. See also *Herrick v Leonard and Dingley Ltd* [1975] 2 NZLR 566, Auck SC; *The Suleyman Stalskiy* [1976] 2 Lloyd's Rep 609, Can SC; *Lummus Co Ltd v East African Harbours Corp* [1978] 1 Lloyd's Rep 317, Kenya HC.

7 'I can see a possibility of success of the agency argument if (1) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability; (2) the bill of lading makes it clear that the carrier, in addition to contracting for those provisions on his own behalf, is also contracting as agent for the stevedore that those provisions should apply to the stevedore; (3) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice; and (4) that any difficulties about consideration moving from the stevedore were overcome': *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 474, [1962] 1 All ER 1 at 10, HL, per Lord Reid.

8 Whether the exclusion clause as a matter of construction extends to C is decided on ordinary principles (as to which see para 803 et seq ante): *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1

Lloyd's Rep 155. In *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC, it was held that in a bill of lading in which the shippers sought to exclude the liability of themselves and, inter alios, of stevedores, the bill of lading brought into existence a bargain, initially unilateral but capable of becoming mutual, between the shippers and the stevedores which became a full contract when the stevedores performed services by discharging the goods, the performance of those services for the benefit of the shipper being the consideration for the agreement by the shipper that the stevedores should have the benefit of the exemptions contained in the bill of lading. See also *The Mahkutai* [1996] AC 650, [1996] 3 All ER 502, PC (exclusive jurisdiction clause expressed to extend to agents and subcontractors did not protect the shipowner).

9 Cf the doctrine of the undisclosed principal: see AGENCY vol 1 (2008) PARAS 125, 156 et seq; see also *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 466, [1962] 1 All ER 1 at 6, HL, per Viscount Simonds.

10 As to the authority of an agent see generally AGENCY vol 1 (2008) PARA 29 et seq. It has been held that there was no agency where C was unascertained at the relevant time: *Southern Water Authority v Carey* [1985] 2 All ER 1077. However, in *Godina v Patrick Operations Pty Ltd* [1984] 1 Lloyd's Rep 333, NSW CA, it was held that the carrier had been impliedly authorised by the stevedore to obtain immunity on its behalf, because, as a matter of commercial practice stevedores relied on carriers to have this in mind when formulating their contract of carriage.

11 *Celthene Pty Ltd v WKJ Hauliers Pty Ltd* [1981] 1 NSWLR 606, NSW SC (ratification by C pleading the exclusion clause as a defence); *Godina v Patrick Operations Pty Ltd* [1984] 1 Lloyd's Rep 333, NSW CA (see note 10 supra). As to ratification see AGENCY vol 1 (2008) PARA 57 et seq. Quaere the position when a contract is made which purports to protect one party's employees but the employee who is sued enters employment after the contract is made.

12 Performance (and promise of performance) of a pre-existing contractual duty owed to a third party constitutes valuable consideration (see para 746 ante). However, there are difficulties. In *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL, which concerned damage caused by a stevedore when handling a consignee's goods, the stevedore sought to prove that he should benefit from a term in the shipowners' bill of lading which limited the carrier's liability. The term 'carrier' was said to include 'any person ... whether acting as carrier or bailee'. It was held that: (1) the stevedore was not within the term 'carrier'; (2) the shipowners were not agents of the stevedore; and (3) there was no basis for implying a contract between the consignee and the stevedore. In *Celthene Pty Ltd v WKJ Hauliers Pty Ltd* [1981] 1 NSWLR 606, NSW SC it was held that C provided the consideration by performing the contract, without the necessity for knowledge of the existence of the exclusion clause or giving independent consideration); and in *The Mahkutai* [1996] AC 650 at 664, [1996] 3 All ER 502 at 512, PC, Lord Goff of Chieveley suggested that 'the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development and recognise in these cases a fully-fledged exception to the doctrine of privity, thus escaping from all the technicalities with which the courts are now faced in English law'.

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### 817. Sub-bailments.

Where A by contract bails goods to B<sup>1</sup>, it may be envisaged<sup>2</sup> that B may in turn by contract sub-bail the goods to C<sup>3</sup>. If the goods are lost or damaged, the prima facie position is as follows. B will be liable for breach of a contractual duty to take care of the goods at the suit of A<sup>4</sup>, or perhaps A's consignee<sup>5</sup>; whereas there is usually no privity of contract between A and C, unless made through the agency of B<sup>6</sup>. In the absence of such a contract between A and C<sup>7</sup>, provided C is aware of A's interest in the goods, prima facie C will owe A a duty of care in the tort of negligence<sup>8</sup>; and B may be vicariously liable for C's negligence<sup>9</sup>.

To avoid such prima facie liability for loss or damage to the goods, there may be an exclusion clause purporting to protect B and C either in the head contract between A and B; or in the sub-contract between B and C. Leaving aside the efficacy of such a clause in the head contract between A and B to protect B<sup>10</sup>, the position may be as follows<sup>11</sup>. Where C purports to rely on the benefit of the exclusion clause in the head bailment contract between A and B, prima facie, as he is not privy to that bailment contract, C cannot rely upon it<sup>12</sup>, unless B contracted as agent on C's behalf<sup>13</sup>. Nor can C claim vicarious immunity purportedly conferred by the bailment<sup>14</sup>. He might, however, be able to rely on those terms by virtue of the sub-bailment<sup>15</sup>. Where B and C purport to rely on the exclusion clause in the sub-bailment contract between B and C to cast a burden on A, prima facie A cannot be bound by that sub-bailment contract to which he is not a party<sup>16</sup>, unless B entered that contract on A's behalf<sup>17</sup>. However, there is some authority to indicate that A is bound by the terms of the sub-bailment if he expressly or impliedly consented to B making the sub-bailment on those terms<sup>18</sup>; or perhaps even if A did not so consent<sup>19</sup>. The courts have, however, shown reluctance to extend this beyond the realms of sub-bailment<sup>20</sup>.

1 See eg *Bainbridge v Firmstone* (1838) 8 Ad & El 743; and para 736 note 5 ante. See further BAILMENT.

2 The contract may envisage that B may either perform the contract personally, or secure performance by C. If such an arrangement is made with C, there are two possible interpretations of B's position: (1) B may be under no further liability to A (eg transshipment clauses in bills of lading: see CARRIAGE AND CARRIERS vol 7 (2008) PARA 496 et seq; SHIPPING AND MARITIME LAW vol 94 (2008) PARA 669); or (2) B may remain liable to A for C's vicarious performance (see para 757 note 7 ante).

3 See eg *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA. As to sub-bailment see further BAILMENT vol 3(1) (2005 Reissue) para 41.

4 This is probably on the basis of breach of an implied term of the bailment contract: see para 781 ante.

5 See para 763 head (6) ante.

6 See para 816 ante.

7 See para 749 ante.

8 See *Meux v Great Eastern Rly Co* [1895] 2 QB 387, CA; *L Harris (Harella) Ltd v Continental Express Co* [1961] 1 Lloyd's Rep 251; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Learoyd Bros & Co v Pope & Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep 142; *Moukattaf v British Overseas Airways Corp* [1967] 1 Lloyd's Rep 396; *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 3 All ER 825, [1970] 1 WLR 1262, PC; *James Buchanan & Co Ltd v Hay's Transport Services Ltd and Duncan Barbour & Son Ltd* [1972] 2 Lloyd's Rep 535; *Chas Davis (Metal Brokers) v Gilyott and Scott Ltd* [1975] 2 Lloyd's Rep 422. As to the duty of care see NEGLIGENCE vol 78 (2010) PARA 1 et seq. As to tort claims in the absence of privity see generally para 759 ante.

9 As to vicarious liability generally see EMPLOYMENT; TORT.

10 See para 797 et seq ante.

11 This is subject always to the clause, as a matter of construction, being wide enough to offer protection to B or C against the event which occurred: *The Mahkutai* [1996] AC 650, [1996] 3 All ER 502, PC (exclusive jurisdiction clause did not fall within the expression 'exceptions, limitations, conditions and liberties'). 'The present case is however concerned not with a question of enforceability of a term in a sub-bailment by the sub-bailee against the head bailor, but with the question whether a sub-contractor is entitled to take the benefit of a term in the head contract. The former depends on the scope of the authority of the intermediate bailor to act on behalf of the head bailor in agreeing on his behalf to the relevant term in the sub-bailment; whereas the latter depends on the scope of the agreement between the head contractor and the sub-contractor, entered into by the intermediate contractor as agent for the sub-contractor, under which the benefit of a term in the head contract may be made available by the head contractor to the sub-contractor': *The Mahkutai* supra at 667-668 and at 515 per Lord Goff of Chieveley.

12 *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280; *Moukataff v British Overseas Airways Corp* [1967] 1 Lloyd's Rep 396.

13 See para 816 ante; and AGENCY vol 1 (2008) PARA 121 et seq.

14 See para 814 ante.

15 *Spectra International plc v Hayesoak Ltd* [1997] 1 Lloyd's Rep 153, Central London County Court.

16 *L Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep 251; *Learoyd Bros & Co v Pope & Sons (Dock Carriers)* [1966] 2 Lloyd's Rep 142; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280; *Moukataff v British Overseas Airways Corp* [1967] 1 Lloyd's Rep 396; *Chas Davis (Metal Brokers) v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep 422.

17 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 731, [1965] 2 All ER 725 at 734, CA, per Diplock LJ, and at 741 and 740 respectively per Salmon LJ.

18 *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522 at 564, HL, per Lord Sumner; *The Kite* (1933) 46 Ll L Rep 83; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 729-730, [1965] 2 All ER 725 at 733, CA, per Denning LJ, and at 741 and 740 respectively per Salmon LJ; *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215 at 220 per Donaldson J; *Hispanica de Petroleos SA v Vencedora Oceanica Navegacion SA, The Kapetan Markos (No 2)* [1987] 2 Lloyd's Rep 321 at 332, 340, CA, per Mustill J; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164; *Compania Portorrafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 405, CA, per Bingham LJ; *The Pioneer Container* [1994] 2 AC 324, sub nom *The Pioneer Container, KH Enterprise (Cargo Owners) v Pioneer Container (Owners)* [1994] 2 All ER 250, PC.

19 *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215 at 220 per Donaldson J. See also *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 168 per Steyn J; *Compania Portorrafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 406, CA, per Bingham LJ; *Mitsui & Co Ltd v Novorossiysk Shipping Co, The Gudermes* [1993] 1 Lloyd's Rep 311 at 327, CA, per Staughton LJ. Contra *The Pioneer Container* [1994] 2 AC 324 at 340-341, sub nom *The Pioneer Container, KH Enterprise (Cargo Owners) v Pioneer Container (Owners)* [1994] 2 All ER 250 at 261, PC, obiter per Lord Goff of Chieveley delivering the judgment of the court.

20 See *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Swiss Bank Corp v Brink's-MAT Ltd* [1986] QB 853, [1986] 2 All ER 188; *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL; *Compania Portorrafti Commerciale SA v Ultramar Panama Inc, The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 404-405, CA, per Bingham LJ.

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### (C) BURDEN OF AN EXCLUSION CLAUSE

#### **818. Third party and the burden of an exclusion clause.**

The cases thus far considered<sup>1</sup> involve a contract between A and B containing an exclusion clause which purports to exempt a third party, C, from some liability and behind which C seeks shelter. On the other hand, there may be a contract between A and B, containing an exclusion clause for the benefit of B behind which B seeks to shelter in an action against him for injuring C, a third party, while B was performing his contract with A. The rule here is that A and B cannot simply, by contract between themselves, impose the burden of the exclusion clause upon C<sup>2</sup>. Where, however, on the proper interpretation of the facts A or B is acting as agent for C to make C a party to the contract, C may be bound by the exclusion clause if, on its proper construction<sup>3</sup>, it is sufficiently wide<sup>4</sup>. Similarly, the facts may support an implied contract between B and C containing the same exclusion clause as that between A and B, in which case C will be similarly bound<sup>5</sup>. The issue of whether the contractual promise to B, if known about by C, can oust the liability of B to C in negligence by way of the doctrine of *volenti non fit injuria* is considered elsewhere in this work<sup>6</sup>.

1 See paras 814-817 ante.

2 *Haseldine v CA Daw & Son Ltd*[1941] 2 KB 343, [1941] 3 All ER 156, CA (negligence of lift repairer resulting in injury to visitor to premises); see also the Occupiers' Liability Act 1957 s 3(1); and NEGLIGENCE vol 78 (2010) PARA 37; *L Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep 251; *Learoyd Bros & Co and Huddersfield Fine Worsteds Ltd v Pope & Sons (Dock Carriers) Ltd* [1966] 2 Lloyd's Rep 142; *Moukattaf v British Overseas Airways Corp*n [1967] 1 Lloyd's Rep 396. Cf *Port Line Ltd v Ben Line Steamers Ltd*[1958] 2 QB 146, [1958] 1 All ER 787; and CARRIAGE AND CARRIERS; *Ware and De Freville Ltd v Motor Trade Association*[1921] 3 KB 40, CA. See also para 750 note 8 ante.

3 See paras 803-809 ante.

4 *Fosbroke-Hobbes v Airwork Ltd and British American Air Services Ltd*[1937] 1 All ER 108; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450; *Morris v CW Martin & Sons Ltd*[1966] 1 QB 716 at 729, [1965] 2 All ER 725 at 734, CA, obiter per Lord Denning MR. As to agency generally see AGENCY.

An alternative explanation of *Fosbroke-Hobbes v Airwork Ltd and British American Air Services Ltd* supra and *Cockerton v Naviera Aznar SA* supra, is that the third party was a conditional licensee on the defendant's property, the licence containing the same exclusion of liability as the contract. An exclusion clause in a conditional licence is generally effective though non-contractual: see *Ashdown v Samuel Williams & Sons Ltd*[1957] 1 QB 409, [1957] 1 All ER 35, CA. Cf also *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[1964] AC 465, [1963] 2 All ER 575, HL.

5 *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*[1954] 2 QB 402, [1954] 2 All ER 158; *Morris v CW Martin & Sons Ltd*[1966] 1 QB 716 at 729, [1965] 2 All ER 725 at 734, CA, obiter per Lord Denning MR.

6 As to the doctrine of *volenti non fit injuria* see NEGLIGENCE vol 78 (2010) PARA 69.

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### **(iii) Exclusion Clauses and Statutory Provisions**

#### **A. IN GENERAL**

#### **819. Exclusion clauses rendered void either automatically or if unreasonable.**

A number of statutory provisions govern certain types of exclusion clauses or any exclusion clauses in certain types of contracts. The most important of these are:

- 198 (1) the statutory restriction of terms which attempt to exclude liability for misrepresentation<sup>1</sup>;
- 199 (2) the statutory avoidance of terms which attempt to exclude liability for death or personal injury in contracts<sup>2</sup> for the carriage of passengers<sup>3</sup>;
- 200 (3) the statutory invalidation of certain exclusion clauses in contracts for carriage of goods by sea<sup>4</sup> and air<sup>5</sup>;
- 201 (4) a special statutory regime for the Post Office<sup>6</sup>;
- 202 (5) enabling provisions allowing for the introduction of statutory orders to prohibit unfair consumer trade practices<sup>7</sup>, contravention being an offence<sup>8</sup>;
- 203 (6) statutory prohibition on contracting out where there is a regulated agreement<sup>9</sup>;
- 204 (7) provision made by the Unfair Contract Terms Act 1977 with regard to the attempted exclusion of liability for negligence, unreasonable indemnity clauses, liability arising from the sale and supply of goods and other related matters<sup>10</sup>.

Statutory provision is also made with regard to unfair terms not necessarily amounting to exclusion clauses<sup>11</sup>.

1 See the Misrepresentation Act 1967 s 3 (as substituted); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 803.

2 For the common law position in negligence of a passenger on a free pass see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 44, 80; and para 814 note 5 ante. As to attempts to exclude that liability see the Unfair Contract Terms Act 1977 s 2(1); and para 822 post.

3 As to the carriage of passengers by road see the Public Passenger Vehicles Act 1981 s 29; and see generally ROAD TRAFFIC vol 40(3) (2007 Reissue) para 1132 et seq. See also the Unfair Contract Terms Act 1977 s 2(1); and para 822 post. The specific legislation dealing with attempts at exclusion in respect of domestic carriage by rail was repealed by s 31(4), Sch 4; see now s 2(1).

International carriage by rail is governed by the Convention concerning International Carriage by Rail (1980), incorporated into English law by the International Transport Conventions Act 1983 s 1(1). Purported exclusion of liability in relation to international carriage by air is governed by the Warsaw Convention 1929 as amended at the Hague in 1955, set out in the Carriage by Air Act 1961 s 1(1), Sch 1 Pt I art 23(1) (prospectively substituted by the Carriage by Air and Road Act 1979 s 1(1), Sch 1); and see further CARRIAGE AND CARRIERS vol 7 (2008) PARA 154 et seq. Domestic carriage by air is governed by identical rules: see CARRIAGE AND CARRIERS vol 7 (2008) PARA 180 et seq. As to the carriage of passengers by sea see the Merchant Shipping Act 1995 ss 183-192, Sch 6; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 626 et seq. Exclusion clauses in all such contracts are saved from the Unfair Contract Terms Act 1977 by s 29(1): see generally para 821 post. Temporary provision in respect of certain contracts for the carriage of passengers by sea made before 1 May 1987 is made by the Unfair Contract Terms Act 1977 s 28 (now effectively spent).



- 4 See the Carriage of Goods by Sea Act 1971 s 1(2), Schedule art III para 8; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 367. Such contracts are saved from the Unfair Contract Terms Act 1977 by s 29(1): see generally para 821 post.
- 5 See note 3 supra.
- 6 See the Post Office Act 1969 ss 29-30 (as amended); and POST OFFICE.
- 7 See the Fair Trading Act 1973 Pt II (ss 13-33) (as amended).
- 8 See *ibid* s 23 (as amended). For examples of the exercise of this power to make orders see the Mail Order Transactions (Information) Order 1976, SI 1976/1812; the Consumer Transactions (Restrictions on Statements) Order 1976, SI 1976/1813 (amended by SI 1978/127); and the Business Advertisements (Disclosure) Order 1977, SI 1977/1918.
- 9 See CONSUMER CREDIT vol 9(1) (Reissue) para 199.
- 10 See para 821 et seq post.
- 11 See the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; and para 790 et seq ante.

## **UPDATE**

### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **819 Exclusion clauses rendered void either automatically or if unreasonable**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 3--Carriage by Air Act 1961 s 1 substituted, Sch 1A added: SI 1999/1312. See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 121.

NOTE 7--Fair Trading Act 1973 Pt II repealed: Enterprise Act 2002 Sch 26; SI 2008/1277.

NOTE 8--Fair Trading Act 1973 s 23 repealed: SI 2008/1277. SI 1976/1812 revoked: SI 2000/2334. SI 1976/1813 further amended: SI 2005/871.

NOTE 11--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

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## **B. THE UNFAIR CONTRACT TERMS ACT 1977**

### **(A) IN GENERAL**

#### **820. Introduction.**

Whilst most other statutes avoiding or restricting exclusion clauses tend to deal with only one type of contract<sup>1</sup>, the Unfair Contract Terms Act 1977 is of more general application. However, the title of this Act is a misnomer<sup>2</sup>: it does not deal with unfair contract terms generally, but mostly with exclusion clauses in particular types of contract<sup>3</sup>. Certain types of transaction are excluded from its scope<sup>4</sup>.

Part I of the Unfair Contract Terms Act 1977<sup>5</sup> does not render it unlawful<sup>6</sup> to purport to include an invalid exclusion clause in a contract, but simply avoids in some circumstances exclusion clauses within its ambit<sup>7</sup>. Thus, the Act does not prevent the drafting of a commercial contract in such a manner that no promise is ever made or duty arises<sup>8</sup> and it is questionable whether it touches liquidated damages clauses<sup>9</sup>. On the other hand, it has been decided that, in considering whether there has been a breach of obligation, the court has first to leave out of account, at this stage, the contract term which is relied upon by the defence as defeating the plaintiff's claim<sup>10</sup>.

The scheme set up by the 1977 Act draws a sharp distinction between those contracts with an international flavour<sup>11</sup> and wholly domestic contracts<sup>12</sup>, confining its restrictions substantially to exemption clauses<sup>13</sup> in certain<sup>14</sup> of the latter not governed by other legislation<sup>15</sup>. Some of the provisions of the 1977 Act<sup>16</sup> refer to attempts 'to exclude or restrict' liability<sup>17</sup>; and it has been held as follows: first, that a court should look initially at the contract without the exclusion clause<sup>18</sup>; and second, that whether a clause is an exclusion clause is a matter of substance, not form<sup>19</sup>.

1 See para 819 ante.

2 This is due to the late change of the short title when the Bill was before Parliament. The Unfair Contract Terms Act 1977 was passed partly in response to the *Second Report on Exemption Clauses* (1975) (Law Com no 69). The Unfair Contract Terms Act 1977 came into force on 1 February 1978 and nothing in that Act applies to contracts made before that date; but subject to this, it applies to liability for any loss or damage which is suffered on or after that date: s 31(1), (2).

3 Compare the aptly named Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see para 790 ante.

4 See para 828 post.

5 Ie the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended): see para 822 et seq post.

6 But the inclusion of the exclusion clause may in some circumstances amount to an offence: see para 819 note 8 ante.

7 Sometimes the Unfair Contract Terms Act 1977 makes such clauses void (see eg s 2(1); and para 822 post; s 5(1); and para 825 post; s 6(1) (as amended); and para 826 post; and s 7(2); and para 827 post); and in other circumstances it makes such clauses subject to a reasonableness test under s 11 (see para 831 post) (see eg s 2(2); and para 822 post; ss 3, 4; and paras 823-824 post; s 6(3); and para 826 post; and s 7(3); and para 827 post).

8 See *Hancock Shipping Co Ltd v Deacon & Trysail (Private), The Casper Trader* [1991] 2 Lloyd's Rep 550 (indemnity clause provided that defendants were to 'defend, indemnify and hold harmless' the plaintiffs; the Unfair Contract Terms Act 1977 had no application); and see para 798 ante.

9 See para 799 ante.

10 See *Phillips Products Ltd v Hyland* [1987] 2 All ER 620 at 625, [1987] 1 WLR 659n at 664, CA, per Slade LJ in delivering the judgment of the court. In *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831 at 857, [1989] 2 All ER 514 at 530, HL, per Lord Griffiths, a 'but for' test is postulated, inquiring first whether there would be liability 'but for' the exclusion clause. It may be possible to mount a contrary argument on the basis of the closing words of the Unfair Contract Terms Act 1977 s 13(1): see para 833 post. Moreover, how does one distinguish a clause defining the contractual duty (outside the 1977 Act), from one excluding liability for breach of that duty (inside the 1977 Act: see *W Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr LR 146)? Compare the attitude of the courts to exclusion clauses outside Unfair Contract Terms Act 1977: see para 800 ante.

11 See *ibid* Pt III (ss 26-32) (as amended); and paras 834-835 post.

12 See *ibid* Pt I (as amended); and para 822 et seq post. Part II (ss 15-25) applies to Scotland.

13 See *ibid* s 13; and para 833 post.

14 For the exempted types of domestic contract see s 1(2), Sch 1 (as amended); and para 828 post.

15 As to other relevant legislation see para 821 post.

16 See eg the Unfair Contract Terms Act 1977 s 2; and para 822 post; s 3(2)(a); and para 823 post; s 5(1); and para 825 post; ss 6, 7 (as amended); and paras 826-827 post; s 10; and para 830 post. For s 8 see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 803.

17 Cf the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, Sch 3 para 1(a): see para 794 ante.

18 See note 10 *supra*.

19 See *Johnstone v Bloomsbury Health Authority* [1992] QB 333 at 346, [1991] 2 All ER 293 at 301, CA, per Stuart-Smith LJ; *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, [1987] 1 WLR 659n, CA (clause purported to transfer vicarious liability for acts of driver to hirer of the JCB and driver). See also *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA.

## UPDATE

### 819-835 Exclusion Clauses and Statutory Provisions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 820 Introduction

NOTE 3--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

NOTE 17--Now *ibid* Sch 2 para 1(a).

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## 821. Saving for other relevant legislation.

Nothing in Unfair Contract Terms Act 1977 removes or restricts the effect of, or prevents reliance upon, any contractual provision which (1) is authorised or required by the express terms or necessary implication of an enactment<sup>1</sup>; or (2) being made with a view to compliance with an international agreement to which the United Kingdom is a party, does not operate more restrictively than is contemplated by the agreement<sup>2</sup>.

A contract term is to be taken for the purposes of the provisions relating to domestic contracts<sup>3</sup> as satisfying the requirement of reasonableness<sup>4</sup> if it is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority<sup>5</sup> acting in the exercise of any statutory<sup>6</sup> jurisdiction or function and is not a term in a contract to which the competent authority is itself a party<sup>7</sup>.

1 'Enactment' means any legislation (including subordinate legislation) of the United Kingdom or Northern Ireland and any instrument having effect by virtue of such legislation: Unfair Contract Terms Act 1977 s 29(3). For express statutory terms see eg the Law of Property Act 1925 s 42(1) (as amended), ss 42(3), 48(1); and SALE OF LAND; the Defective Premises Act 1972 s 6(3); and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 77. As to statutorily implied terms see para 781 ante. For the meaning of 'United Kingdom' see para 791 note 3 ante.

2 Unfair Contract Terms Act 1977 s 29(1).

3 le for the purposes of ibid Pt I (ss 1-14) (as amended): see para 822 et seq post.

4 As to reasonableness see para 831 post.

5 'Competent authority' means any court, arbitrator or arbiter, government department or public authority: Unfair Contract Terms Act 1977 s 29(3).

6 'Statutory' means conferred by an enactment: ibid s 29(3).

7 Ibid s 29(2). An example of such terms would be model clauses approved by a minister or other official in the exercise of functions conferred by statute: see eg the Agricultural Holdings Act 1986 s 7; and AGRICULTURAL LAND vol 1 (2008) PARA 332.

The Unfair Contract Terms Act 1977 s 29(2) only ousts the ordinary rules where the public authority can be said to have approved the relevant term in the exercise of its statutory function: see *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459, [1996] CLY 1251, CA.

## UPDATE

### 819-835 Exclusion Clauses and Statutory Provisions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## (B) DOMESTIC CONTRACTS

### 822. Negligence liability.

In domestic contracts and subject to certain exceptions, a person cannot by reference to any contract term<sup>1</sup> or to a notice<sup>2</sup> given to persons generally or to particular persons exclude or restrict<sup>3</sup> his business liability<sup>4</sup> for death or personal injury<sup>5</sup> resulting from negligence<sup>6</sup>. In the case of other loss or damage, a person cannot so exclude or restrict his business liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness<sup>7</sup>.

Where a contract term or notice purports to exclude or restrict liability for negligence, a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk<sup>8</sup>.

The above provisions may overlap with those relating to manufacturers' guarantees<sup>9</sup>. Separate provision is made with regard to indemnities in consumer contracts<sup>10</sup>, but indemnities within commercial contracts would seem to fall, if within the Unfair Contract Terms Act 1977, within the above provisions<sup>11</sup>.

1 'Contract term' is not defined by the Unfair Contract Terms Act 1977; however, according to the Law Commission's *Second Report on Exemption Clauses* (1975) (Law Com no 69) p 133 it 'bears its natural meaning of any term in any contract (and is not limited to terms in a contract between the instant parties)'.

A contract term or notice may amount to a contractual exclusion clause which is apt to exclude or restrict liability for breach of either a contractual or tortious duty of care (see *Johnstone v Bloomsbury Health Authority*[1992] QB 333, [1991] 2 All ER 293, CA) or a disclaimer notice apt only to exclude or restrict tort liability. It does not affect the operation of the Unfair Contract Terms Act 1977 that the breach might amount to a fundamental breach: see s 9; and para 829 post. However, the provision is directed at protecting only the person to whom the notice is given or on whom the term is imposed (see *Phillips Products Ltd v Hyland*[1987] 2 All ER 620, [1987] 1 WLR 659n, CA) and has nothing to say about arrangements made by the business to recoup its loss from a third party (see *Thompson v T Lohan (Plant Hire) Ltd*[1987] 2 All ER 631, [1987] 1 WLR 649, CA).

2 'Notice' includes an announcement, whether or not in writing, and any other communication or pretended communication: Unfair Contract Terms Act 1977 s 14. As to disclaimer notices see generally para 800 note 10 ante.

3 As to exclusion clauses see para 833 post.

4 In the case of both contract and tort, the Unfair Contract Terms Act 1977 ss 2-7 (as amended) apply (except where the contrary is stated in s 6(4): see para 826 post) only to business liability, that is liability for breach of obligations or duties arising (1) from things done or to be done by a person in the course of a business (whether his own business or another's); or (2) from the occupation of premises used for business purposes of the occupier; and references to liability are to be read accordingly; but liability of an occupier of premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier: s 1(3) (amended by the Occupiers' Liability Act 1984 s 2). In relation to any breach of duty or obligation, it is immaterial for any purpose of the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended) whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously: s 1(4). 'Business' includes a profession and the activities of any government department or local or public authority: s 14.

5 'Personal injury' includes any disease and any impairment of physical or mental condition: *ibid* s 14; and see *Thompson v T Lohan (Plant Hire) Ltd*[1987] 2 All ER 631, [1987] 1 WLR 649, CA. Where such an injury arises in connection with a 'consumer supply' of goods or services, any such exclusion clause may be an unfair term

within the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see reg 4(4), Sch 3 para 1(a); and para 794 ante.

6 See the Unfair Contract Terms Act 1977 s 2(1). For the exceptions see paras 821 ante, 828 post; and as to international contracts see paras 834-835 post. For the purposes of Pt I (as amended), 'negligence' means the breach: (1) of any obligation, arising from the express or implied terms of a contract, to take reasonable care to exercise reasonable skill in the performance of the contract; (2) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty); (3) of the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957: Unfair Contract Terms Act 1977 ss 1(1), 14.

It is submitted that this definition does not extend to criminal law negligence. There may be concurrent civil liability for negligence in contract and tort: see para 610 ante. As to the implied statutory duty to exercise reasonable care see eg the Congenital Disabilities (Civil Liability) Act 1976 s 1(6).

7 See the Unfair Contract Terms Act 1977 s 2(2). See eg *Monarch Airlines Ltd v London Luton Airport Ltd* [1998] 1 Lloyd's Rep 403; *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, [1987] 1 WLR 659n, CA (the Unfair Contract Terms Act 1977 s 2(2) was applied to a clause which purported to transfer vicarious liability for acts of driver to hirer of the JCB and driver); *Smith v Eric S Bush*; *Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *McCullagh v Lane Fox & Partners Ltd* [1996] PNL 205, [1996] 1 EGLR 35, CA (where a surveyor employed by a building society attempted in his report to disclaim liability to the house-buyer relying on his report). As to reasonableness see para 831 post.

8 Unfair Contract Terms Act 1977 s 2(3). Where liability arises in tort, the Unfair Contract Terms Act 1977 thus prevents circumvention of s 2(2) by reliance on the *volenti non fit injuria* principle, as to which see NEGLIGENCE vol 78 (2010) PARAS 69-70; TORT. As to imposing the burden of a contract on a third party see para 750 ante.

9 See *ibid* s 5; and para 825 post.

10 See *ibid* s 4; and para 824 post.

11 See Adams and Brownsword, 'Double Indemnity--Contractual Indemnity Clauses Revisited' [1988] JBL 146.

## UPDATE

### 819-835 Exclusion Clauses and Statutory Provisions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 822 Negligence liability

NOTE 5--SI 1994/3159 reg 4(4), Sch 3 para 1(a) now SI 1999/2083 reg 5(5), Sch 2 para 1(a).

NOTE 7--The Unfair Contract Terms Act 1977 does not apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce it is a third party acting in reliance of the Contracts (Rights of Third Parties) Act 1999 s 1 (see PARA 763A.1): s 7(2).

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### 823. Liability arising in contract.

In domestic contracts and subject to certain exceptions, the following provisions apply as between contracting parties where one of them deals as consumer<sup>1</sup> or on the other's written standard terms of business<sup>2</sup>. As against that party, the other cannot by reference to any contract term:

- 205 (1) when himself in breach of contract, exclude or restrict any business liability of his in respect of the breach<sup>3</sup>; or
  - 206 (2) claim to be entitled:
- 1
- 1. (a) to render a contractual performance substantially different from that which was reasonably expected of him<sup>4</sup>; or
  - 2. (b) in respect of the whole or any part of his contractual obligation, to render no performance at all<sup>5</sup>,
- 2

except in so far as (in any of the cases mentioned above) the contract term satisfies the requirement of reasonableness<sup>6</sup>.

Where the contract is one for the supply of goods, there appears to be considerable overlap between the above provisions and other provisions dealing with statutory implied terms which are discussed below<sup>7</sup>; but it may be that they should be reconciled by limiting the above provisions to express terms<sup>8</sup>.

1 As to 'dealing as a consumer' see para 832 post.

2 See the Unfair Contract Terms Act 1977 s 3(1). For the exceptions see paras 821 ante, 828 post. Note that the guidelines set out in s 11(2), Sch 2 have also been applied by analogy to s 3: see para 831 note 14 post.

This provision will protect a party whether acting in the course of business or privately if he contracts with another party using that party's written standard terms of business and thus deals with two overlapping classes of contract: see eg *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481, 95 LGR 592, CA (the local authority entered into a contract with ICL for the supply of computer software designed to administer the collection of the community charge. Notwithstanding that ICL had £50 million of insurance worldwide, the contract purported to limit ICL's liability to £100,000. The software contained an error which caused the local authority to collect less revenue than was due and ICL sought to rely on the limitation clause. The Court of Appeal unanimously confirmed that there was a breach of an express term of ICL's written standard terms of business; moreover, whilst the Sale of Goods Act 1979 did not apply because 'software' was not included in the statutory definition of 'goods', there was also found to be a breach of the common law implied term as to fitness). See also *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd* (1991) 56 BLR 115; *Lease Management Services Ltd v Purnell Secretarial Services Ltd* [1994] (1994) 13 Tr LR 337, CA; *Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 ConLR 1, CA; *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654; *Oval (717) Ltd v Aegon Insurance Co (UK) Ltd* (1997) 54 ConLR 74.

There is no statutory definition of the phrase 'written standard terms of business'. As to such terms see eg *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd* [1989] 2 Lloyd's Rep 570 at 611; *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 605, [1992] 2 All ER 257 at 259, CA, per Lord Donaldson MR; *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481, 95 LGR 592, CA. For the meaning of 'business' see para 822 note 4 ante. The standard terms will in any event be read contra proferentem: see paras 776, 803 ante.

As to the more flexible statutory concept of terms 'not individually negotiated' within the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 3 see para 791 ante.

3 See the Unfair Contract Terms Act 1977 s 3(2)(a). As to liability see para 822 note 4 ante. Where such an injury arises in connection with a consumer supply, any such exclusion may be an unfair term within the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see reg 4(3), Sch 3 para 1(b); and para 794 ante.

4 See the Unfair Contract Terms Act 1977 s 3(2)(b)(i); and see eg *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481, 95 LGR 592, CA (held: the limitation clause failed to satisfy the requirement of reasonableness). As to reasonableness see para 831 post. Where there is a consumer supply, this provision may overlap with the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, Sch 1 para 1(j), (k), (l), (o): see para 794 ante.

5 See eg *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459, [1996] CLY 1251, CA.

6 See the Unfair Contract Terms Act 1977 s 3(2)(b)(ii); and see eg *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, CA. Where there is a consumer supply, this provision may overlap with the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, Sch 1 para 1(c): see para 794 ante.

7 See the Unfair Contract Terms Act 1977 ss 6, 7 (as amended), which in some circumstances make the exclusion clause void rather than subject to the reasonableness test; and paras 826-827 post.

8 See *W Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr LR 146. Contra *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, [1987] 1 WLR 659n, CA.

## UPDATE

### 819-835 Exclusion Clauses and Statutory Provisions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 823 Liability arising in contract

NOTES--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

NOTE 2--SI 1994/3159 reg 3 now SI 1999/2083 reg 4.

NOTE 3--SI 1994/3159 reg 4(3), Sch 3 para 1(b) now SI 1999/2083 reg 5(5), Sch 2 para 1(b).

NOTES 4, 6--SI 1994/3159 Sch 3 para 1 now SI 1999/2083 Sch 2 para 1.

NOTE 4--The contractual performance reasonably expected of a party to a contract is not limited by the construction of the contract, otherwise the purpose of the 1977 Act would be defeated: *Zockoll Group Ltd v Mercury Communications Ltd* [1998] ITCLR 104, CA.



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#### **824. Unreasonable indemnity clauses.**

In domestic contracts and subject to certain exceptions, a person dealing as consumer<sup>1</sup> cannot by reference to any contract term be made to indemnify<sup>2</sup> another person<sup>3</sup> (whether a party to the contract or not) in respect of liability<sup>4</sup> that may be incurred by the other for negligence<sup>5</sup> or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness<sup>6</sup>. These provisions apply whether the liability in question is (1) directly that of the person to be indemnified or is incurred by him vicariously<sup>7</sup>; or (2) to the person dealing as consumer or to someone else<sup>8</sup>.

1 For the meaning of 'dealing as consumer' see para 832 post.

2 As to the distinction between indemnities and guarantees see para 1024 post.

3 As to indemnifying third parties see para 815 ante.

4 As to liability and breach see para 822 note 4 ante.

5 For the meaning of 'negligence' see para 822 note 6 ante.

6 See the Unfair Contract Terms Act 1977 s 4(1). For the exceptions see paras 821 ante, 828 post; as to international contracts see paras 834-835 post; and as to reasonableness see para 831 post.

7 Ibid s 4(2)(a). See eg *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA.

8 Unfair Contract Terms Act 1977 s 4(2)(b).

#### **UPDATE**

#### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/825. Guarantee of consumer goods.

## **825. Guarantee of consumer goods.**

In domestic contracts and subject to certain exceptions, in the case of goods<sup>1</sup> of a type ordinarily supplied for private use or consumption, where loss or damage arises from the goods proving defective while in consumer use<sup>2</sup>, and results from the negligence<sup>3</sup> of a person concerned in the manufacture or distribution of the goods<sup>4</sup>, business liability<sup>5</sup> for the loss or damage cannot be excluded or restricted by reference to any contract term or notice<sup>6</sup> contained in or operating by reference to a guarantee of the goods<sup>7</sup>.

For these purposes (1) goods are to be regarded as 'in consumer use' when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business<sup>8</sup>; and (2) anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise<sup>9</sup>.

These provisions do not apply as between the parties to a contract under or in pursuance of which possession or ownership of the goods passed<sup>10</sup>. Such contracts are dealt with elsewhere in this work<sup>11</sup>.

1 'Goods' has the same meaning as in the Sale of Goods Act 1979 (ie it includes all personal chattels other than things in action and money, and in particular it includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale and includes an undivided share in goods: see s 61 (definition amended by the Sale of Goods (Amendment) Act 1995 s 2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 30); Unfair Contract Terms Act 1977 s 14.

2 As to 'consumer use' see heads (1)-(2) in the text; cf the concept of 'dealing as consumer', as to which see para 832 post. 'Loss or damage' and 'defective' are not statutorily defined for these purposes.

3 For the meaning of 'negligence' see para 822 note 6 ante. In view of the Unfair Contract Terms Act 1977 s 5(3) (see note 10 infra), in this context 'negligence' will usually involve only tortious negligence, as to which see *Donoghue v Stevenson* [1932] AC 562, HL; and NEGLIGENCE vol 78 (2010) PARA 4; TORT.

4 For examples of such negligence see *Donoghue v Stevenson* [1932] AC 562, HL (manufacturer's negligence); *Watson v Buckley, Osborne, Garrett & Co Ltd and Wyrovoy's Products Ltd* [1940] 1 All ER 174 (distributor's negligence); *Andrews v Hopkinson* [1957] 1 QB 229, [1956] 3 All ER 422 (retailer's negligence).

5 As to liability see para 822 note 4 ante.

6 As to contract terms, and for the meaning of 'notice', see para 822 notes 1-2 ante.

7 See the Unfair Contract Terms Act 1977 s 5(1). For the exceptions see paras 821 ante, 828 ante; and as to international contracts see paras 834-835 post.

8 Ibid s 5(2)(a). For the meaning of 'business' see para 822 note 4 ante.

9 Ibid s 5(2)(b).

10 Ibid s 5(3). As to the exclusion of negligence liability as between contracting parties see s 2; and para 822 ante.

11 See generally SALE OF GOODS AND SUPPLY OF SERVICES.

## **UPDATE**

### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/826. Sale and hire-purchase.

## **826. Sale and hire-purchase.**

In domestic contracts and subject to certain exceptions, liability for breach<sup>1</sup> of the obligations arising from the seller's implied undertakings as to title in relation to the sale of goods<sup>2</sup> or in relation to hire-purchase<sup>3</sup> cannot be excluded or restricted by reference to any contract term<sup>4</sup>.

As against a person dealing as consumer<sup>5</sup>, liability for breach of the obligations arising from the seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose<sup>6</sup> or the corresponding obligations in relation to hire-purchase<sup>7</sup>, cannot be excluded or restricted by reference to any contract term<sup>8</sup>. As against a person dealing otherwise than as consumer, this liability can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness<sup>9</sup>.

1 The liabilities referred to in the text and notes 2-9 infra are not only the business liabilities defined by the Unfair Contract Terms Act 1977 s 1(3) (see para 822 note 4 ante) but include those arising under any contract of sale of goods or hire-purchase agreement: s 6(4). 'Hire-purchase agreement' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) para 95): Unfair Contract Terms Act 1977 s 14. As to breach of an obligation see para 822 note 4 ante.

2 I.e obligations arising from the Sale of Goods Act 1979 s 12 (as amended): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 69, 467.

3 I.e obligations arising from the Supply of Goods (Implied Terms) Act 1973 s 8 (as substituted and amended): see CONSUMER CREDIT vol 9(1) (Reissue) para 24.

4 See the Unfair Contract Terms Act 1977 s 6(1) (s 6(1), (2) amended by the Sale of Goods Act 1979 s 63, Sch 2 para 19). For the exceptions see paras 821 ante, 828 post; and as to international contracts see paras 834-835 post.

5 For the meaning of 'dealing as consumer' see para 832 post.

6 I.e obligations arising from the Sale of Goods Act 1979 ss 13, 14 or 15 (all as amended): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 467.

7 I.e obligations arising from the Supply of Goods (Implied Terms) Act 1973 ss 9, 10 or 11 (all as substituted and amended): see CONSUMER CREDIT vol 9(1) (Reissue) para 24.

8 Unfair Contract Terms Act 1977 s 6(2) (as amended: see note 4 supra).

9 Ibid s 6(3). See eg *W Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr LR 146; see also *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600, [1992] 2 All ER 257, CA. As to whether 'in so far' may allow apportionment see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 816, [1983] 2 All ER 737 at 743-744, HL, per Lord Bridge (decided under the slightly different wording of the Sale of Goods Act 1979 s 55 as transitorily substituted by s 55(3), Sch 1 para 11). As to reasonableness see para 831 post.

It is submitted that this category includes those situations where the supply is not in the course of business (eg breaches of the undertakings as to description or sample: see the Sale of Goods Act 1979 ss 13, 15 (as amended)); or where the transferee acquires the goods in the course of business (ie where the buyer does not 'deal as consumer'); or in so far as the contract is one for services (ie obligations arising under the Supply of Goods and Services Act 1979 s 13); or the goods are not of a type ordinarily supplied for private use or consumption. See further SALE OF GOODS AND SUPPLY OF SERVICES.

## **UPDATE**

### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

## **826 Sale and hire-purchase**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/827. Miscellaneous contracts under which goods pass.

### **827. Miscellaneous contracts under which goods pass.**

In domestic contracts and subject to certain exceptions, where the possession or ownership of goods<sup>1</sup> passes under or in pursuance of a contract not governed by the law of sale of goods or hire-purchase, the following provisions apply as regards the effect (if any) to be given to contract terms excluding or restricting liability for breach<sup>2</sup> of obligation arising by implication of law from the nature of the contract<sup>3</sup>. As against a person dealing as consumer<sup>4</sup>, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term<sup>5</sup>. As against a person dealing otherwise than as consumer, that liability can be excluded or restricted by reference to such a term, but only in so far as the term satisfies the requirement of reasonableness<sup>6</sup>.

Liability:

- 207 (1) for breach of the obligations arising from the implied terms about title in certain contracts for the transfer of the property in goods<sup>7</sup> cannot be excluded or restricted by references to any such term<sup>8</sup>;
- 208 (2) in respect of (a) the right to transfer ownership of the goods or give possession; or (b) the assurance of quiet possession to a person taking goods in pursuance of the contract, cannot, in a case to which head (1) above does not apply, be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of reasonableness<sup>9</sup>.

1 For the meaning of 'goods' see para 825 note 1 ante.

2 As to liability and breach see para 822 note 4 ante.

3 See the Unfair Contract Terms Act 1977 s 7(1). For the exceptions see paras 821 ante, 828 post. Section 7 (as amended) does not apply in the case of goods passing on a redemption of trading stamps within the Trading Stamps Act 1964 or the Trading Stamps Act (Northern Ireland) 1965: Unfair Contract Terms Act 1977 s 7(5). As to contracts for the sale of goods and hire-purchase contracts see para 827 ante.

4 For the meaning of 'dealing as consumer' see para 832 post.

5 Unfair Contract Terms Act 1977 s 7(2).

6 Ibid s 7(3). As to reasonableness see para 831 post. As to circumstances within this provision see para 826 note 9 ante.

7 I.e obligations arising from the Supply of Goods and Services Act 1982 s 2: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 70.

8 Unfair Contract Terms Act 1977 s 7(3A) (added by the Supply of Goods and Services Act 1982 s 17(2), (3)).

9 Unfair Contract Terms Act 1977 s 7(4).

### **UPDATE**

### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

**827 Miscellaneous contracts under which goods pass**

NOTE 3--1977 Act s 7(5) repealed: SI 2005/871.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/828. Exemptions.

## 828. Exemptions.

Certain provisions of Part I of the Unfair Contract Terms Act 1977<sup>1</sup> relating to negligence liability, liability arising in contract and unreasonable indemnity clauses<sup>2</sup> do not extend to the following types of contract:

- 209 (1) any contract of insurance (including a contract to pay an annuity on human life)<sup>3</sup>;
- 210 (2) any contract so far as it relates to the creation or transfer of an interest in land<sup>4</sup>, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise<sup>5</sup>;
- 211 (3) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark<sup>6</sup>, copyright or design right, registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest<sup>7</sup>;
- 212 (4) any contract so far as it relates to the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership), or to its constitution or the rights or obligations of its corporators or members<sup>8</sup>;
- 213 (5) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities<sup>9</sup>.

Nor do those provisions, or the provisions relating to miscellaneous contracts under which goods pass<sup>10</sup>, extend to any contract of marine salvage or towage<sup>11</sup>, any charterparty of a ship or hovercraft<sup>12</sup>, or any contract for the carriage of goods<sup>13</sup> by ship or hovercraft<sup>14</sup>, except that a person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence with respect to such contracts<sup>15</sup>. Where goods are carried by ship or hovercraft in pursuance of a contract which either (a) specifies that as the means of carriage over part of the journey to be covered; or (b) makes no provision as to the means of carriage and does not exclude that means, then certain of the provisions previously mentioned<sup>16</sup> do not, except in favour of a person dealing as consumer<sup>17</sup>, extend to the contract as it operates for and in relation to the carriage of the goods by that means<sup>18</sup>.

Certain provisions relating to negligence liability<sup>19</sup> do not extend to a contract of employment, except in favour of the employee<sup>20</sup>; and special provision is made with regard to any discharge and indemnity given by a person, on or in connection with an award to him of compensation for pneumoconiosis attributable to employment in the coal industry, in respect of any further claim arising from his contracting that disease<sup>21</sup>.

1    Ie the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended): see paras 822 et seq ante, 829 et seq post.

2    Ie ibid s 2 (negligence liability: see para 822 ante); s 3 (liability arising in contract: see para 823 ante); and s 4 (unreasonable indemnity clauses: see para 824 ante).

3    Ibid s 1(2), Sch 1 para 1(a). Insurance contracts are not confined to contracts for the payment of a sum of money but include contracts for some benefit corresponding to the payment of a sum of money: see



*Department of Trade and Industry v St Christopher Motorists Association Ltd* [1974] 1 All ER 395, [1974] 1 WLR 99. See also *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654.

4 Although the Unfair Contract Terms Act 1977 does not define 'land' it is submitted that the exemption may not extend to contractual licences. Presumably the dichotomy between the definitions of 'goods' and 'land' mirrors the Sale of Goods 1979 s 61 (as amended): see para 825 note 1 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 30.

5 Unfair Contract Terms Act 1977 Sch 1 para 1(b). As to the transfer and termination of interests in land see *Electricity Supply Nominees Ltd v IAF Group plc* [1993] 3 All ER 372, [1993] 1 WLR 1059; *Cheltenham and Gloucester Building Society v Ebbage* [1994] CLY 3292, Portsmouth county court. For examples of other legislation concerning exemption clauses in respect of contracts transferring an interest in land see para 821 note 1 ante.

6 References to trade marks or registered trade marks within the meaning of the Trade Marks Act 1938 (repealed) are, unless the context otherwise requires, to be construed as references to trade marks or registered trade marks within the meaning of the Trade Marks Act 1994: see s 106(1), Sch 4 para 1 (as amended).

7 Unfair Contract Terms Act 1977 Sch 1 para 1(c) (amended by the Copyright, Designs and Patents Act 1988 s 303(1), Sch 7 para 24). See *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654.

8 Unfair Contract Terms Act 1977 Sch 1 para 1(d); see also COMPANIES vol 14 (2009) PARAS 102, 245.

9 Ibid Sch 1 para 1(e); and see *Micklefield v SAC Technology Ltd* [1991] 1 All ER 275, [1990] 1 WLR 1002.

10 Ie the Unfair Contract Terms Act 1977 s 7 (as amended): see para 827 ante.

11 See ibid Sch 1 para 2(a).

12 See ibid Sch 1 para 2(b).

13 For the meaning of 'goods' see para 825 note 1 ante.

14 See the Unfair Contract Terms Act 1977 Sch 1 para 2(c).

15 Ie ibid s 2(1) (see para 822 ante) applies: see Sch 1 para 2. For the meaning of 'notice' see para 822 note 2 ante.

16 Ie ibid ss 2(2), 3, 4: see paras 822-824 ante.

17 For the meaning of 'dealing as consumer' see para 832 post.

18 Unfair Contract Terms Act 1977 Sch 1 para 3.

19 Ie ibid s 2(1), (2): see para 822 ante.

20 Ibid Sch 1 para 4; and see TORT vol 45(2) (Reissue) para 807.

21 Ibid s 2(1) does not affect the validity of any such discharge and indemnity: see Sch 1 para 5. This takes account of an especially generous coal industry agreement as regards industrial injury to miners: see 384 HL Official Report (5th series) col 518. See further SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 168.

## UPDATE

### 819-835 Exclusion Clauses and Statutory Provisions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/829. Effect of breach.

### **829. Effect of breach.**

Where for reliance upon it a contract term has to satisfy the requirement of reasonableness<sup>1</sup>, it may be found to do so and be given effect accordingly notwithstanding that the contract has been terminated either by breach or by a party electing to treat it as repudiated<sup>2</sup>.

Where on a breach the contract is nevertheless affirmed by a party entitled to treat it as repudiated, this does not of itself exclude the requirement of reasonableness in relation to any contract term<sup>3</sup>.

1 As to reasonableness see para 831 post.

2 Unfair Contract Terms Act 1977 s 9(1). This provision was thought necessary on an earlier view of the effect of fundamental breach: see paras 805 note 11, 812 notes 11-12 ante.

3 Ibid s 9(2). See para 812 note 13 ante.

### **UPDATE**

#### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/830. Evasion by means of secondary contract.

### **830. Evasion by means of secondary contract.**

A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another's liability<sup>1</sup> which Part I of the Unfair Contract Terms Act 1977<sup>2</sup> prevents that other from excluding or restricting<sup>3</sup>.

The above provision applies where A contracting with X and B in separate agreements agrees with X that he will not sue B in respect of future claims<sup>4</sup>; it has no application where the parties to both contracts are the same<sup>5</sup> or with regard to compromises of existing claims<sup>6</sup>.

1 See para 822 note 4 ante.

2 In the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended): see paras 822 et seq ante, 831 et seq post.

3 Ibid s 10.

4 At common law, such a clause could only be effective where X has agreed to indemnify B: see *Gore v Van Der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA. With this limitation, X could obtain a stay of proceedings to prevent A suing B: see para 763 note 14 ante.

5 See *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53 at 65, [1991] 4 All ER 1 at 13, CA, per Browne-Wilkinson V-C. Such a case would fall within the ordinary rules of the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended): see paras 822-827 ante.

6 See *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53 at 65-66, [1991] 4 All ER 1 at 13-14, CA, per Browne-Wilkinson V-C. An example of the application of the Unfair Contract Terms Act 1977 s 10 may be where a consumer (A) agrees with a servicer (X) under a maintenance contract that he will not sue the retailer (B) from whom the goods were purchased: see *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53 at 65, [1991] 4 All ER 1 at 13, CA, per Browne-Wilkinson V-C.

## **UPDATE**

### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/831. The reasonableness test.

### **831. The reasonableness test.**

In relation to a contract term<sup>1</sup>, the requirement of reasonableness for the purposes of Part I of the Unfair Contract Terms Act 1977<sup>2</sup> is that the term must have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made<sup>3</sup>. In determining, for the purposes of the provisions relating to sale, hire-purchase and miscellaneous contracts under which goods pass<sup>4</sup>, whether a contract term satisfies the requirement of reasonableness<sup>5</sup>, regard must be had in particular to certain specified matters<sup>6</sup> which are<sup>7</sup> any of the following which appear to be relevant:

- 214 (1) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met<sup>8</sup>;
- 215 (2) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term<sup>9</sup>;
- 216 (3) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties)<sup>10</sup>;
- 217 (4) where the term excludes or restricts any relevant liability<sup>11</sup> if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable<sup>12</sup>; and
- 218 (5) whether the goods<sup>13</sup> were manufactured, processed or adapted to the special order of the customer<sup>14</sup>.

In relation to a notice<sup>15</sup> (not being a notice having contractual effect), the requirement of reasonableness under the Unfair Contract Terms Act 1977 is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen<sup>16</sup>.

Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises under the Unfair Contract Terms Act 1977 or any other Act whether the term or notice satisfies the requirement of reasonableness, regard must be had<sup>17</sup> in particular to: (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise<sup>18</sup>; and (b) how far it was open to him to cover himself by insurance<sup>19</sup>.

It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does<sup>20</sup>.

1 See para 822 note 1 ante.

2 I.e. the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended): see paras 822 et seq ante, 832-833 post. See also the Misrepresentation Act 1967 s 3 (as substituted); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 803. Compare the test of unfairness in contracts subject to the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4: see para 793 ante.

3 Unfair Contract Terms Act 1977 s 11(1); and see *South Western General Property Co Ltd v Marton* [1982] 2 EGLR 19, (1982) 2 Tr LR 14; *Stag Line Ltd v Tyne Shiprepair Group Ltd, The Zinnia* [1984] 2 Lloyd's Rep 211; *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd* (1991) 56 BLR 115; *McCullagh v Lane Fox & Partners Ltd* [1996] PNLR 205, [1996] 1 EGLR 35, CA; *Skipskredittforeningen v Emperor Navigation* [1997] 11 CL 271; *WRM Group Ltd v Wood* [1998] 5 CL 94, CA.

Note, however, the express saving for a contractual term incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function and which is not a term in a contract to which the competent authority is itself a party; such a term is to be taken as satisfying the requirement of reasonableness: see the Unfair Contract Terms Act 1977 s 29(2); and para 821 ante.

4 le for the purposes of *ibid* s 6 or s 7 (both as amended); see paras 826-827 ante.

5 See eg *Oval (717) Ltd v Aegon Insurance UK Ltd* (1997) 54 ConLR 74 (test concentrates on the reasonableness of the term included in a particular contract); *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 607, [1992] 2 All ER 257 at 261, CA, per Lord Donaldson MR, and at 608 and 262 per Stuart-Smith LJ (held: the reasonableness test must be applied to the whole clause). Reference cannot be made to circumstances arising after the making of the contract, but is confined to matters existing at the formation of the contract: see *Phillips Products Ltd v Hyland* [1987] 2 All ER 620 at 628, [1987] 1 WLR 659n at 668, CA, per Slade LJ; cf *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL; *Second Report on Exemption Clauses* (1975) (Law Com no 69) para 171. Nor does the longevity of an exclusion clause or disclaimer appear to be any defence: see *Walker v Boyle, Boyle v Walker* [1982] 1 All ER 634, [1982] 1 WLR 495; *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA; *First National Commercial Bank plc v Loxleys* [1996] EGCS CA.

An exclusion clause: (1) cannot be fair and reasonable to exclude liability for breach of an express promise; nor for B to exclude liability for breach of an implied term which was fundamental to the contract; (2) which would be unreasonable if put forward by a supplier of goods cannot be reasonable just because put forward by a financier (B) on the basis of his non-inspection of the goods. The burden of proof on B will not be lightly discharged and certainly not by standard terms purporting to negative an express oral assurance: see *Lease Management Services Ltd v Purnell Secretarial Services Ltd* [1994] CCLR 127, 13 Tr LR 337 at 344-346, CA, per Sir Donald Nicholls V-C.

6 Unfair Contract Terms Act 1977 s 11(2). However, this provision does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract: s 11(2).

7 le for the purposes of *ibid* ss 6(3), 7(3), (4) (as amended): see paras 826-827 ante.

8 *Ibid* s 11(2), Sch 2 para (a). See eg *W Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr LR 146 (A chose a new photographic processing machine from a manufacturer and arranged to take it on hire-purchase from B; however, it was unfit for the purpose supplied and B sought to rely on certain clauses in the agreement; held: (1) the clauses stood or fell for all purposes; (2) the deemed examination clause was reasonable; and (3) the exclusion clause was not within the Unfair Contract Terms Act 1977 s 3 but was within s 7 (as amended) but the exclusion clause was reasonable). Other examples might be a two-tier pricing system; or a monopoly supplier.

9 *Ibid* Sch 2 para (b). See eg *Warren v Truprint Ltd* [1987] Abr para 425, Luton county court; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164.

10 Unfair Contract Terms Act 1977 Sch 2 para (c). See eg *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 609, [1992] 2 All ER 257 at 263, CA, per Stuart-Smith LJ; *Photoprint Ltd v Forward Trust Ltd* (1993) 12 Tr LR 146. Cf *RW Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL (cases on the Sale of Goods Acts 1893 (repealed) and 1979: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 450-451).

11 See para 822 note 4 ante.

12 Unfair Contract Terms Act 1977 Sch 2 para (d). See eg *Sargant v CIT (England) (t/a Citalia)* [1994] CLY 566, Croydon county court.

13 For the meaning of 'goods' see para 825 note 1 ante.

14 Unfair Contract Terms Act 1977 Sch 2 para (e). In any particular case, various of these factors may come into play and the court must weigh the factors and strike a balance: *W Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr LR 146 (the presence of a deemed examination provision was only one of the factors to be taken into account in assessing the reasonableness of exemption clause). These factors 'are usually regarded as being of general application to the question of reasonableness' and apply by analogy to the Unfair Contract Terms Act

1977 s 3: see *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 608, [1992] 2 All ER 257 at 262, CA, per Stuart-Smith LJ. As to the Unfair Contract Terms Act 1977 s 3 see para 823 ante.

The Unfair Contract Terms Act 1977 Sch 2 is based on the *First Report on Exemption Clauses* (1975) (Law Com no 24) para 113 which was first given statutory effect in amendments to the sale of goods legislation. As to the interpretation of the Unfair Contract Terms Act 1977 Sch 2 see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL (decided on the sale of goods legislation as amended to give effect to the *First Report on Exemption Clauses*).

Note the overlap between the Unfair Contract Terms Act 1977 Sch 2 paras (a)-(e) and the 'good faith' criteria within the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(3), Sch 2: see para 793 ante.

15 For the meaning of 'notice' see para 822 note 2 ante.

16 Unfair Contract Terms Act 1977 s 11(3). See eg *Stevenson v Nationwide Building Society* [1984] 2 EGLR 165; *Davies v Parry* [1988] 1 EGLR 147; *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *Beaton v Nationwide Building Society* [1991] 2 EGLR 145 (cases on disclaimers in mortgage documents).

17 But without prejudice to the Unfair Contract Terms Act 1977 s 11(2) in the case of contract terms: s 11(4).

18 Ibid s 11(4)(a).

19 Ibid s 11(4)(b). See *Flamar Interocean Ltd v Denmac Ltd*, *The Flamar Pride and Flamar Progress* [1990] 1 Lloyd's Rep 434; *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654; *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481, 95 LGR 592, CA; *Monarch Airlines Ltd v London Luton Airport Ltd* [1998] 1 Lloyd's Rep 403.

20 Unfair Contract Terms Act 1977 s 11(5). See *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, CA. A party does not have to plead the unreasonableness of another's exclusion clause: see *Sheffield v Pickfords Ltd* (1997) 16 Tr LR 337, (1997) Times, 17 March, CA.

## UPDATE

### 819-835 Exclusion Clauses and Statutory Provisions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 831 The reasonableness test

NOTE 2--SI 1994/3159 reg 4 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5.

NOTE 3--See also *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All ER (Comm) 586.

NOTE 8--See *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696 (exclusion clauses negotiated by representatives of substantial companies of equal bargaining power found to be fair and reasonable).

NOTE 14--SI 1994/3159 reg 4(3), Sch 2 revoked and not reproduced in SI 1999/2083.

NOTES 19, 20--See *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep 273, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/832. Meaning of 'dealing as consumer'.

### 832. Meaning of 'dealing as consumer'.

A party to a contract 'deals as consumer'<sup>1</sup> in relation to another party if (1) he neither makes the contract in the course of a business<sup>2</sup> nor holds himself out as doing so<sup>3</sup>; (2) the other party does make the contract in the course of a business<sup>4</sup>; and (3) in the case of a contract governed by the law of sale of goods or hire-purchase<sup>5</sup> or by the provisions relating to miscellaneous contracts under which goods pass<sup>6</sup>, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption<sup>7</sup>. However, on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer<sup>8</sup>. Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not<sup>9</sup>.

1 The Unfair Contract Terms Act 1977 uses the concept of 'dealing as consumer' in a number of contexts: (1) s 3(1) (see para 823 ante); (2) s 4 (see para 824 ante); and (3) ss 6, 7 (as amended) (see paras 826-827 ante). Subsequently, this concept has also been employed in the Sale and Supply of Goods Act 1994 which amends, *inter alia*, the Sale of Goods Act 1979: see generally SALE OF GOODS AND SUPPLY OF SERVICES.

2 As to the meaning of 'course of business' see *Davies v Sumner* [1984] 3 All ER 831, [1984] 1 WLR 1301, HL (decision on the Trade Descriptions Act 1968); applied in *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd (Saunders Abbott (1980) Ltd third party)* [1988] 1 All ER 847, [1988] 1 WLR 321, CA (private freight forward company purchased car for the use of its directors, this being the second or third purchase in five to six years; held: there was insufficient regularity of car purchase to make that purchase an integral part of the buyer's business; and see at 854 and at 330-331 per Dillon LJ ('there are some transactions which are clearly integral parts of the businesses concerned, and these should be held to have been carried out in the course of those businesses; this would cover, apart from much else, the instance of a one-off adventure in the nature of trade where the transaction itself would constitute a trade or business. There are other transactions, however, such as the purchase of the car in the present case, which are at the highest only incidental to the carrying on of the relevant business; here a degree of regularity is required before it can be said that they are an integral part of the business carried on and so entered into in the course of that business')). Quaere whether the ruling in *Davies v Sumner* supra would be applied to even the first purchase by a public company. For the meaning of 'business' see para 822 note 4 ante.

3 Unfair Contract Terms Act 1977 s 12(1)(a). See eg *Lease Management Services Ltd v Purnell Secretarial Services Ltd* [1994] CCLR 127, 13 Tr LR 337, CA.

4 Unfair Contract Terms Act 1977 s 12(1)(b). Unless s 12(2) applies (see the text to note 8 infra), any contract made by a party as a private person is excluded (including contracts negotiated through a business agent on a regular basis). At very least, this requirement seems to stipulate that the contract must go through the books of a business; quaere whether any goods supplied must be part of the circulating assets of the business, or whether it is sufficient that they form part of the fixed plant and equipment.

5 As to contracts governed by the law of sale of goods or hire-purchase see *ibid* s 6 (as amended); and para 826 ante. For the meaning of 'goods' see para 825 note 1 ante. As to the sale of goods see generally SALE OF GOODS AND SUPPLY OF SERVICES.

6 *Ibid* s 7 (as amended): see para 827 ante.

7 *Ibid* s 12(1)(c). Cf s 5(2)(a) ('in consumer use'): see para 825 ante.

8 *Ibid* s 12(2). If the goods fail to reach their reserve price and are subsequently sold by private treaty, the position is unclear: see eg *D and M Trailers (Halifax) Ltd v Stirling* [1978] RTR 468, CA (a case on the sale of Goods Act 1893 (repealed: see now the Sale of Goods Act 1979; and SALE OF GOODS AND SUPPLY OF SERVICES)).

9 Unfair Contract Terms Act 1977 s 12(3).

### UPDATE

### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **832 Meaning of 'dealing as consumer'**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(B) Domestic Contracts/833. Varieties of exemption clause.

### 833. Varieties of exemption clause.

To the extent that Part I of the Unfair Contract Terms Act 1977<sup>1</sup> prevents the exclusion<sup>2</sup> or restriction<sup>3</sup> of any liability<sup>4</sup>, it also prevents (1) making the liability or its enforcement subject to restrictive or onerous conditions<sup>5</sup>; (2) excluding or restricting any right or remedy in respect of the liability<sup>6</sup>, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy<sup>7</sup>; and (3) excluding or restricting rules of evidence or procedure<sup>8</sup>. In addition, to that extent, certain provisions of Part I of that Act<sup>9</sup> also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty<sup>10</sup>. However, an agreement in writing to submit present or future differences to arbitration is not to be treated<sup>11</sup> as excluding or restricting any liability<sup>12</sup>.

1    Ie the Unfair Contract Terms Act 1977 Pt I (ss 1-14) (as amended): see para 822 et seq ante.

2    As to the exclusion of liability see eg *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd* [1934] 1 KB 17, CA. There is no objection here to preventing the duty from arising: see para 798 ante.

3    As to the restriction of liability see eg *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL. 'Exclusion' and 'restriction' have not been comprehensively defined by the Unfair Contract Terms Act 1977; as to the common law interpretation of exclusion clauses see para 797 ante.

4    See para 822 note 4 ante.

5    Eg a term requiring notification of loss within a specified time or in a specified manner. Quaere whether clauses allowing the supplier of goods to substitute a later model or overly complex instructions for use amounts to restrictive or onerous conditions?

6    Ie a term denying a right to rescind for breach of condition, or limiting liability to a specified amount. Quaere whether the term extends to the statutory right of examination on the supply of goods?

7    See eg *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600, [1992] 2 All ER 257, CA (suppressing a right of set-off); *Skipskredittforeningen v Emperor Navigation* [1997] 11 CL 271 (a similar case). Such suppression is not at common law contrary to public policy: *Coca-Cola Financial Corp v Finsat International Ltd* [1998] 8 QB 43, [1996] 2 Lloyd's Rep 274, CA. But it is unclear whether the Unfair Contract Terms Act 1977 s 13(1)(b) extends to any compromise a consumer makes with regard to a claim.

8    Ibid s 13(1)(a)-(c). See eg *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600, [1992] 2 All ER 257, CA (making the buyer pay the price and then mount a separate action); *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, CA (a similar case). These excluded and restricted clauses may also fall within the 'grey list' of unfair terms in consumer contracts: see para 794 ante. As to force majeure clauses see para 906 post.

9    Ie the Unfair Contract Terms Act 1977 ss 2, 5-7 (as amended): see paras 822, 825-827 ante.

10   Ibid s 13(1). As to the incorporation of notices in a transaction see eg *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL; and for the meaning of 'notice' see para 822 note 2 ante. Quaere whether 'obligation' introduces clauses which purport to prevent any contractual duty from arising, as the Unfair Contract Terms Act 1977 ss 6, 7 (as amended) deal only with contractual liability. Sections 2, 5 deal only with tortious liability; this comprehends non-contractual notices purporting to exclude or restrict that liability: see *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600 at 606, [1992] 2 All ER 257 at 260, CA, per Lord Donaldson MR.

11   Ie under the Unfair Contract Terms Act 1977 Pt I (as amended): see para 822 et seq ante.

12   Ibid s 13(2); and see ARBITRATION.

### UPDATE

### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(C) International Contracts/834. International supply contracts.

## (C) INTERNATIONAL CONTRACTS

### 834. International supply contracts.

The limits imposed by the Unfair Contract Terms Act 1977 on the extent to which a person may exclude or restrict liability<sup>1</sup> by reference to a contract term do not apply to liability arising under such a contract as is described below<sup>2</sup> and the terms of such a contract are not subject to any requirement<sup>3</sup> of reasonableness<sup>4</sup>. Subject to heads (a) to (c) below, that description of contract is one whose characteristics are the following:

- 219 (1) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes<sup>5</sup>; and
- 220 (2) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different states, the Channel Islands and the Isle of Man being treated for this purpose as different states from the United Kingdom<sup>6</sup>.

A contract falls within heads (1) and (2) above only if either:

- 221 (a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one state to the territory of another<sup>7</sup>; or
- 222 (b) the acts constituting the offer and acceptance have been done in the territories of different states<sup>8</sup>; or
- 223 (c) the contract provides for the goods to be delivered to the territory of a state other than that within whose territory those acts were done<sup>9</sup>.

1 As to liability see para 822 note 4 ante.

2 Unfair Contract Terms Act 1977 s 26(1).

3 Ie under *ibid* s 3 or s 4: see paras 823-824 ante.

4 *Ibid* s 26(2). As to reasonableness see para 831 ante.

5 *Ibid* s 26(3)(a)

6 *Ibid* s 26(3)(b). For the meaning of 'United Kingdom' see para 791 note 3 ante. As to habitual residence see eg *INCOME TAXATION* vol 23(2) (Reissue) para 1262. As to international sales contracts see further paras 629 note 5, 684 ante; and see generally *SALE OF GOODS AND SUPPLY OF SERVICES* vol 41 (2005 Reissue) para 322 et seq.

7 *Ibid* s 26(4)(a).

8 *Ibid* s 26(4)(b).

9 *Ibid* s 26(4)(c).

## UPDATE

### 819-835 Exclusion Clauses and Statutory Provisions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **834 International supply contracts**

NOTE 6--'Parties', for the purposes of the 1977 Act s 26(3)(b), refers to the principals to the contract in question, and not to agents through which the contract may have been made: *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 All ER (Comm) 519, CA.

NOTE 7--Head (a) does not require an undertaking to deliver the goods to another state: *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2009] 1 All ER (Comm) 35 (affirmed: [2009] EWCA Civ 290, [2010] QB 86, [2009] 2 All ER (Comm) 1050).

NOTE 9--See *Amiri Flight Authority v BAE Systems plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep 767 (contract signed in Abu Dhabi for goods to be manufactured and delivered in England not an international supply contract).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/5. CONTRACTUAL TERMS/(4) EXCLUSION CLAUSES/(iii) Exclusion Clauses and Statutory Provisions/B. THE UNFAIR CONTRACT TERMS ACT 1977/(C) International Contracts/835. Choice of law clauses.

### **835. Choice of law clauses.**

Where the law applicable to a contract is the law of any part of the United Kingdom<sup>1</sup> only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) certain provisions of the Unfair Contract Terms Act 1977<sup>2</sup> do not operate as part of the law applicable to the contract<sup>3</sup>. However, the 1977 Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where either or both (1) the term appears to the court or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Unfair Contract Terms Act 1977<sup>4</sup>; or (2) in the making of the contract one of the parties dealt as consumer<sup>5</sup>, and he was then habitually resident<sup>6</sup> in the United Kingdom, and the essential steps necessary for the making of the contract<sup>7</sup> were taken there, whether by him or by others on his behalf<sup>8</sup>.

1 For the meaning of 'United Kingdom' see para 791 note 3 ante. As to the law applicable to contracts see the Contracts (Applicable Law) Act 1990; and CONFLICT OF LAWS vol 8(3) (Reissue) para 353 et seq.

2 Ie the Unfair Contract Terms Act 1977 ss 2-7 (as amended) (see para 822 et seq ante) and the corresponding provisions relating to Scotland.

3 Ibid s 27(1) (amended by the Contracts (Applicable Law) Act 1990 s 5, Sch 4 para 4). See *Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd* [1997] 7 CL 318.

4 Unfair Contract Terms Act 1977 s 27(2)(a). For a similar common law rule see para 856 post.

5 For the meaning of 'dealing as consumer' see para 832 ante.

6 As to habitual residence see eg INCOME TAXATION vol 23(2) (Reissue) para 1262.

7 As to the formation of a contract see para 629 et seq ante.

8 Unfair Contract Terms Act 1977 s 27(2)(b). This provision prevents domestic suppliers of goods and services setting up foreign subsidiaries in order to execute contracts, thus escaping the scope of the Unfair Contract Terms Act 1977. As to choice of law clauses see eg *Indian Oil Corpn v Vanoil Inc* [1991] 2 Lloyd's Rep 634. Cf the position under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see reg 7; and para 791 ante.

### **UPDATE**

#### **819-835 Exclusion Clauses and Statutory Provisions**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **835 Choice of law clauses**

NOTE 8--SI 1994/3159 reg 7 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 9.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(1) IN GENERAL/836. Introduction.

## 6. VOID AND ILLEGAL CONTRACTS

### (1) IN GENERAL

#### 836. Introduction.

There are several classes of contracts which, though perfect as to form<sup>1</sup>, agreement<sup>2</sup> and consideration<sup>3</sup>, are not given full effect because they offend against the policy of the law<sup>4</sup>. Some contracts may be illegal in the sense that they involve the commission of a legal wrong, whether by statute<sup>5</sup> or the common law<sup>6</sup>, or because they offend against fundamental principles of order or morality<sup>7</sup>. Less objectionable contracts may be simply void<sup>8</sup> by common law<sup>9</sup> or statute<sup>10</sup>.

In respect of certain contracts invalidated under the above principles it is not absolutely clear whether they are illegal or void<sup>11</sup>; but the distinction must be made, because there are differences between illegal and void contracts in respect of related agreements<sup>12</sup>, severability<sup>13</sup> and recovery of property transferred or money paid under such contracts<sup>14</sup>.

1 As to form see paras 620-628 ante. As to contracts which may be rendered void or unenforceable by the absence of writing see para 623 ante.

2 See para 631 et seq ante.

3 See paras 727-747 ante.

4 As to the establishment of invalidity see para 838 post.

5 See eg *JM Allan (Merchandising) Ltd v Cloke*[1963] 2 QB 340, [1963] 2 All ER 258, CA (contract illegal, no action could lie for recovery of rent); *Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd*[1973] 2 All ER 856, [1973] 1 WLR 828, CA (plaintiff who had sanctioned loading vehicle in excess of regulations unable to obtain damages when load was spilled); and see para 867 post. For the statutory validation of contracts see *Pyx Granite Co Ltd v Ministry of Housing and Local Government*[1960] AC 260, [1959] 3 All ER 1, HL; and STATUTES.

6 See paras 839-840 post.

7 See paras 844-855, 858-860 post.

8 It may be that 'unenforceable' would be a more accurate description: see para 887 note 9 post.

9 See paras 856-857, 861-866 post. Ultra vires contracts are similar in their consequences, but are not objectionable on the ground of public policy: see para 837 post.

10 See para 867 post.

11 See para 843 post. Furthermore, in many of the cases 'illegal' is used to describe contracts which in the modern law are clearly only 'void'.

12 See paras 878-879 post.

13 See para 877 post.

14 See para 880 et seq post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(1) IN GENERAL/837. Ultra vires contracts.

### **837. Ultra vires contracts.**

Apart from the main classes of contracts which are illegal or void<sup>1</sup>, ultra vires contracts are also void at common law even though they contain none of the objectionable features inherent in the main classes. The basic rule of the common law is that a corporation<sup>2</sup> or incorporated company is bound by the restrictions imposed on its capacity by the terms of its incorporation, so that any contract which is not within the scope of that capacity is void, even if assented to or ratified by every member of the corporation<sup>3</sup> or company<sup>4</sup>. However, statute now provides that the validity of an act done by a company must not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum; and that in favour of a person dealing with a company in good faith, the power of the directors to bind the company or authorise others to do so, is deemed to be free of any limitation under the company's constitution<sup>5</sup>. Thus the common law no longer holds sway in most cases and ultra vires has little application. The only exceptions are where the company is a registered charity<sup>6</sup>; in relation to contracts between the company and its directors<sup>7</sup>; and where the capacity of a body is governed by foreign law<sup>8</sup>.

1 See para 836 ante.

2 But this restriction does not apply to a corporation created by charter: *Sutton's Hospital Case* (1612) 10 Co Rep 1a, 23a, Ex Ch; and see further CORPORATIONS vol 9(2) (2006 Reissue) para 1192.

3 *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653; and see further CORPORATIONS vol 9(2) (2006 Reissue) para 1192.

4 As to company law generally see COMPANIES.

5 See the Companies Act 1985 s 35 (as substituted); s 35A (as added). A party to a transaction with a company is not bound to inquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so: s 35B (as added).

6 See the Charities Act 1993 s 65(1), which applies the ultra vires rule except in favour of a person who gives full consideration and does not know the act is beyond the companies powers and in favour of a person who does not know the company is a charity.

7 See the Companies Act 1985 s 322A (as added) which provides that such a transaction is voidable at the instance of the company.

8 *Merrill Lynch Capital Services Inc v Municipality of Piraeus* [1997] 5 CL 41 (powers of municipality governed by Greek law).

### **UPDATE**

#### **837 Ultra vires contracts**

NOTES 5, 7--Companies Act 1985 ss 35, 35A, 35B, 322A replaced by Companies Act 2006 ss 39-41: see COMPANIES vol 14 (2009) PARAS 263-265.

NOTE 6--Charities Act 1993 s 65 omitted: SI 2009/1941.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(1) IN GENERAL/838. Establishment of invalidity.

### **838. Establishment of invalidity.**

Where a contract is on the face of it illegal<sup>1</sup> or void<sup>2</sup> the court will take notice of that fact and refuse to enforce the contract even though the vitiating factor has not been pleaded<sup>3</sup>, and even though the defendant does not wish to raise the objection<sup>4</sup>. If, however, the contract on its face discloses no illegality or other vitiating factor, the court should not allow such matters to be raised unless pleaded<sup>5</sup>. Where illegality is pleaded by one party, but denied by the other, the court should not set the action aside at the interlocutory stage, but should allow the matter to go for trial on the evidence<sup>6</sup>. In the event that unpleaded facts are revealed in evidence<sup>7</sup> and show that the contract is illegal or void, the court should decline to enforce the contract, if satisfied that all the relevant facts are before it<sup>8</sup>.

Where it is alleged that the contract is illegal under some foreign law, the test is whether the contract would be legal when applying English public policy<sup>9</sup>.

Where there is nothing on the face of the contract to show that it is illegal, extrinsic evidence is admissible to prove the illegality, even if the contract is made by deed<sup>10</sup>.

The rule whereby the Court of Appeal will not allow an appellant from a county court to raise the issues of law not raised at the trial<sup>11</sup> has no application to an issue as to whether the contract is illegal<sup>12</sup>. It is the duty of counsel to draw the attention of the court to illegality<sup>13</sup>.

A party to a written contract in which the illegality does not appear on the face of the document may institute an action to have the instrument delivered up to be cancelled<sup>14</sup>.

1 As to contracts which are illegal, as opposed to merely void, see paras 836 ante, 844-855, 858-860, 867 post.

2 As to void contracts see paras 836 ante, 856, 857, 861-866, 867 post.

3 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, HL.

4 *Royal Exchange Assurance Corp v Sjöforsakrings Aktiebolaget Vega* [1902] 2 KB 384, CA; *Société des Hôtels Reunis (SA) v Hawker* (1913) 29 TLR 578; *Evans v Richardson* (1817) 3 Mer 469; *Luckett v Wood* (1908) 24 TLR 617.

5 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, HL (contract void; restraint of trade); *Lipton v Powell* [1921] 2 KB 51, DC (contract illegal: breach of money-lending legislation).

6 *Mitsubishi Corp v Alafouzos* [1988] 1 FTLR 47, [1988] 1 Lloyd's Rep 191.

7 This might come about because the plaintiff brings evidence of illegal transactions in order to prove his case (see eg *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, CA) or because the plaintiff does not object to the defendant's introduction of the evidence of illegality (see *Edler v Auerbach* [1950] 1 KB 359 at 371, [1949] 2 All ER 692 at 697, obiter per Devlin J).

8 *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, CA (agreement for 'rigging' the market coming to light in presentation of plaintiff's case); *Gedge v Royal Exchange Assurance Corp* [1900] 2 QB 214 (marine insurance policy produced in evidence contained illegal ppi clause); *Royal Exchange Assurance Corp v Sjöforsakrings Aktiebolaget Vega* [1902] 2 KB 384, CA (marine insurance policy void as not complying with stamp duty legislation); *Luckett v Wood* (1908) 24 TLR 617; *Kregor v Hollins* (1913) 109 LT 225, CA (agreement between director and shareholder); *Montefiore v Munday Motor Components Co Ltd* [1918] 2 KB 241 (contract to exercise improper influence); *Commercial Air Hire Ltd v Wrightways Ltd* [1938] 1 All ER 89 (agreement to take delivery of aircraft without compliance with statutory requirements); *Marles v Philip Trant & Sons Ltd* [1953] 1 All ER 645 (sale of seeds without compliance with statutory requirements); *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494, PC (fraud on public administration); *Snell v Unity Finance Co Ltd* [1964] 2 QB 203,



[1963] 3 All ER 50, CA (breach of statute); *Constable v Rault* [1968] NZLR 769 (breach of exchange control legislation).

9 *Mitsubishi Corp v Alafouzos* [1988] 1 FTLR 47, [1988] 1 Lloyd's Rep 191.

10 *Collins v Blantern* (1767) 2 Wils 341; *Gas Light and Coke Co v Turner* (1840) 6 Bing NC 324, Ex Ch; *Benyon v Nettlefold* (1850) 3 Mac & G 94. The position is presumably the same when the contract is simply void. As to extrinsic evidence see para 690-700 ante.

11 See *Smith v Baker & Sons Ltd* [1891] AC 325, HL; and COURTS.

12 *Snell v Unity Finance Co Ltd* [1964] 2 QB 203, [1963] 3 All ER 50, CA; see also *Connolly v Consumers' Cordage Co* (1903) 89 LT 347, PC.

13 *Mercantile Credit Co Ltd v Hamblin* [1964] 1 All ER 680n, [1964] 1 WLR 423n; affd without consideration of this point [1965] 2 QB 242, [1964] 3 All ER 592, CA. Quaere as to the relationship between this principle and that mentioned in the text to note 5 supra.

14 See *Bishop of Winchester v Fournier* (1752) 2 Ves Sen 445; and EQUITY.

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## **(2) CONTRACTS ILLEGAL OR VOID AT COMMON LAW**

### **(i) Contracts to Commit a Legal Wrong**

#### **839. Contracts to commit a legal wrong.**

An agreement<sup>1</sup> to do that which is a crime<sup>2</sup> or a tort<sup>3</sup> is illegal and will not be enforced by the courts.

Although to a very large extent it overlaps with the principle stated above, there is a wider principle that a contract made with the purpose of committing a fraud on a third person<sup>4</sup> or on the public<sup>5</sup> cannot be enforced. Typical of the application of this principle are cases relating to agreements with creditors<sup>6</sup>. Where a debtor enters into a deed of composition with his creditors, a secret agreement, whether by the debtor or a third party, to give one of the creditors an additional benefit is a fraud upon the other creditors, because each creditor consents to lose part of his debt in consideration of the others doing the same, and equality among the creditors is an implied condition of the arrangement<sup>7</sup>. In such a case not only is the creditor who has entered into the secret agreement with the debtor unable to enforce the stipulation for his benefit, but the deed remains operative against him so that he loses both the right to the composition and his original debt which has been released<sup>8</sup>. It is immaterial that the creditor receiving preferential treatment guarantees payment of a specified composition to the other creditors if they do not consent to the arrangement<sup>9</sup>.

Similarly, any agreement made with the object of giving a creditor preferential treatment in the event of the bankruptcy of a debtor, such as an agreement for a security or for additional security to take effect only in case of bankruptcy<sup>10</sup>, is void as a fraud on the bankruptcy laws<sup>11</sup>. A person who purchases at an undervalue bills drawn and accepted by persons known to be contemplating bankruptcy, can prove in the bankruptcy of the acceptors only for the sum paid by him<sup>12</sup>. An agreement by which the assets of a member of the Stock Exchange upon being declared a defaulter vest in the official assignee for the exclusive benefit of the Stock Exchange creditors is void if bankruptcy supervenes<sup>13</sup>.

1 See para 631 ante.

2 Whether made so by statute (*Bigos v Boustead*[1951] 1 All ER 92 (exchange control legislation)) or at common law (*Fores v Johnes* (1802) 4 Esp 97 (criminal libel)). It may be that the very agreement constitutes the crime of conspiracy even though the fulfilment of the purpose by one party might not be an offence: *Scott v Brown, Doering, McNab & Co*[1892] 2 QB 724, CA ('rigging' the market). As to the effect of breach of the statutory criminal law see para 869 et seq post.

3 *Apthorp v Neville & Co* (1907) 23 TLR 575 (libel); *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd*[1957] 2 QB 621 at 638, [1957] 2 All ER 844 at 857, CA, obiter per Pearce LJ. Though there is no clear authority on the point, it may be that where A is contractually bound to B, and C, knowing of A's contract with B, makes another, inconsistent contract with A, the contract between A and C is illegal, for C may have committed the tort of inducing breach of contract: see *British Homophone Ltd v Kunz and Crystallite Gramophone Record Manufacturing Co Ltd* (1935) 152 LT 589 at 592, obiter per du Parc J; and see para 611 ante; and *Lauterpacht 'Contracts to Break a Contract'* (1936) 52 LQR 494.

4 *Jackson v Duchaire* (1790) 3 Term Rep 551 (secret agreement in fraud of purchaser); *Wyburd v Stanton* (1803) 4 Esp 179 (secret commission for recommending customer); *Waldo v Martin* (1825) 4 B & C 319 (agreement to pay share of emoluments on procuring appointment to office); *Begbie v Phosphate Sewage Co*(1876) 1 QBD 679, CA (sale of valueless rights, in contemplation of fraud on shareholders of intended

company); *Taylor v Bowers*(1876) 1 QBD 291, CA (fictitious transfer of stock in trade in fraud of creditors); *Odessa Tramways Co v Mendel*(1878) 8 ChD 235, CA (agreement by directors with shareholder in order to allot shares at a discount); *Re Ambrose Lake Tin and Copper Mining Co, ex p Taylor, ex p Moss*(1880) 14 ChD 390, CA (sale of property at excessive price on flotation of company); *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd*[1957] 2 QB 621, [1957] 2 All ER 844, CA (false bill of lading, though no dishonest intent).

5 *Willis v Baldwin* (1780) 2 Doug KB 450 (fraud by government contractor); *McGregor v Lowe* (1824) 1 C & P 200 (flotation of fraudulent loan); *Post v Marsh*(1880) 16 ChD 395 (misrepresentation as to authorship of book); *Scott v Brown, Doering, McNab & Co*[1892] 2 QB 724, CA ('rigging' the market); *Montefiore v Munday Motor Components Co Ltd*[1918] 2 KB 241 (agreement to use position and influence to obtain a benefit from the government); *Alexander v Rayson*[1936] 1 KB 169, CA (documents of transaction intended to defraud rating authority); *Miller v Karlinski* (1945) 62 TLR 85, CA; *Napier v National Business Agency Ltd*[1951] 2 All ER 264, CA (evasion of tax).

As to 'knock outs' at auction sales and mock auctions see AUCTION vol 2(3) (Reissue) para 246. As to agreements injurious to public life see paras 844-846 post.

6 See para 1048 post.

7 *Mallalieu v Hodgson*(1851) 16 QB 689 at 711 per Erle J; see also *Cockshott v Bennett* (1788) 2 Term Rep 763 (security given to a creditor in fraudulent preference held void); *Leicester v Rose* (1803) 4 East 372 (better security given to creditor held void); *Knight v Hunt* (1829) 5 Bing 432 (secret stipulation that one creditor should derive an advantage from a third person in fraud of other creditors); *Howden v Haigh* (1840) 11 Ad & El 1033 (agreement by creditors to accept payment by instalments secured by notes, and further agreement that debtor should indorse to one creditor a bill accepted by a third party in order to give a fraudulent preference; held: the creditor could not sue on the notes given for the instalments, although he had not enforced payment of the acceptance when it became due); *Re Milner, ex p Milner*(1885) 15 QBD 605, CA (third party undertaking to make additional payments to certain creditors to induce them to accept a composition); *Re EAB*[1902] 1 KB 457 (security under scheme of arrangement rendered sufficient by withdrawal of some creditors, this having been obtained by a third party giving them security but without the knowledge of the debtor; held: there being no bargain by or with the knowledge of the debtor, the court would not refuse to sanction the scheme); *Farmers' Mart Ltd v Milne*[1915] AC 106, HL (agreement by trustee that, in consideration that certain creditors would consent to his so acting, he would allow part of his remuneration to be applied in securing such creditors a preferential dividend; held: a fraud upon the bankruptcy laws in that it defeated the equal distribution of the bankrupt's assets); *Re Johns, Worrell v Johns*[1928] 1 Ch 737 (provision in a mortgage to the effect that, if the mortgagor were made bankrupt, a larger sum should be paid to the mortgagee than if he were not made bankrupt held void). See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 415.

8 *Re Cross* (1848) 4 De G & Sm 364n; *Re Hodgson, ex p Oliver* (1851) 4 De G & Sm 354; *Re Harvey, ex p Phillips* (1888) 36 WR 567, CA; *Re Myers, ex p Myers*[1908] 1 KB 941.

9 *Staines v Wainwright* (1839) 6 Bing NC 174.

10 *Re Jeavons, ex p Mackay, ex p John Brown & Co*(1873) 8 Ch App 643; *Re Thompson, ex p Williams*(1877) 7 ChD 138, CA. See also note 7 supra. On this principle a clause in a building contract providing for the forfeiture of materials to the owner in the event of the bankruptcy of the builder was held void: *Re Harrison, ex p Jay*(1880) 14 ChD 19, CA; cf *Re Garrud, ex p Newitt*(1881) 16 ChD 522, CA; and see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

11 See also *Re Myers, ex p Myers*[1908] 1 KB 941; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY. Any payment or transfer of property made with a view to preferring a creditor by an insolvent person, who is subsequently adjudicated bankrupt on a petition presented within six months of the transaction, may be set aside as a fraudulent preference, even though it contains no express reference to bankruptcy: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 653 et seq.

12 *Re Gomersall*(1875) 1 ChD 137, CA; affd sub nom *Jones v Gordon*(1877) 2 App Cas 616, HL. See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (Reissue) para 499; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1487.

13 *Tomkins v Saffery*(1877) 3 App Cas 213, HL.

## UPDATE

### 839 Contracts to commit a legal wrong

NOTE 5--Cf *21st Century Logistic Solutions Ltd (in liquidation) v Madysen Ltd*[2004] EWHC 231 (QB), [2004] 2 Lloyd's Rep 92 (contract valid where seller had intention, unknown to buyer, of not paying value added tax on goods supplied).

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#### **840. Benefit from wrong-doing and indemnity against liability.**

Not only will the courts generally refuse to enforce a contract for the commission of a legal wrong<sup>1</sup>, they will generally also adopt the same attitude to a contract whereby one party may claim a benefit from the commission of a crime<sup>2</sup> or a tort<sup>3</sup>, or may claim to be indemnified against the consequences of such an act<sup>4</sup>.

Thus where the beneficiary of a life assurance policy unlawfully kills<sup>5</sup> the assured, under the common law rule known as 'the forfeiture rule' neither the beneficiary<sup>6</sup> nor his personal representatives<sup>7</sup> may recover on the policy, although this rule has been modified by statute in relation to manslaughter<sup>8</sup>. Suicide is no longer a crime<sup>9</sup>, but the question of whether recovery can be made under a policy of life assurance which has no clause excluding death by suicide on the suicide of an assured who is not insane<sup>10</sup> remains to be judicially determined<sup>11</sup>.

An indemnity against criminal liability<sup>12</sup> is in general unenforceable<sup>13</sup>; but where the offence is one of strict liability and the plaintiff commits the offence innocently, it seems that an indemnity is enforceable<sup>14</sup>. An indemnity against the consequences of the deliberate commission of a tort is also unenforceable<sup>15</sup>, but there is nothing bad in an express<sup>16</sup> agreement to indemnify for the consequences of a tort committed innocently or negligently<sup>17</sup>. The fact that the commission of the tort also involves commission of a criminal offence does not necessarily render an indemnity unenforceable<sup>18</sup>; but, where the harm in respect of which indemnity is sought, though in itself unintended, is the result of a deliberate course of violent and unlawful conduct, an indemnity is unenforceable<sup>19</sup>.

1 See para 839 ante.

2 *Geismar v Sun Alliance & London Insurance Ltd* [1978] 1 QB 383, [1977] 3 All ER 570. See also notes 5-8 infra. Where, however, the criminal act is incidental and does not have to be pleaded, the claim may be valid: *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA (insurance of diamonds not invalidated by the issue of an illegal invoice to a customer).

3 There appears to be no actual authority on this, as the cases involve an actual agreement to commit a tort rather than the promise of a benefit contingent on the commission of a tort (see para 839 note 3 ante); but the rule is no doubt the same in either case.

4 See notes 12-19 infra.

5 The rule has been applied in cases of murder and manslaughter: see *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA; *In the Estate of Hall, Hall v Knight and Baxter* [1914] P 1, CA (but it is important to note that the killing in the latter case was deliberate: *Gray v Barr* [1971] 2 QB 554 at 581, [1971] 2 All ER 949 at 964-965, CA, per Salmon LJ). For the very complex issues that may arise when a husband and wife are co-insured and the husband murders the wife see: *Davitt v Titcumb* [1990] Ch 110, [1989] 3 All ER 417.

6 See *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, CA.

7 See *Prince of Wales etc Association Co v Palmer* (1858) 25 Beav 605.

8 See the Forfeiture Act 1982 ss 1, 2, 5 (as amended). For further discussion of the principle that the court will not allow a party to claim benefits from crime see *Beresford v Royal Insurance Co Ltd* [1938] AC 586, [1938] 2 All ER 602, HL; and INSURANCE vol 25 (2003 Reissue) para 530. The principle has been taken so far as to deny recovery on a life policy to the representatives of the assured when the assured suffered death by law for a crime: *Amicable Society v Bolland* (1830) 2 Dow & Cl 1, HL. As to the application of the forfeiture rule to social security benefits see the Forfeiture Act 1982 s 4 (as amended); and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 81.

9 See the Suicide Act 1961 s 1; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 98.

10 Suicide while insane was not a crime even before the Suicide Act 1961 and the policy moneys were payable in the absence of a clause excluding suicide: *Horn v Anglo-Australian and Universal Family Life Assurance Co* (1861) 30 LJ Ch 511; see further INSURANCE.

11 The decision in *Beresford v Royal Insurance Co Ltd* [1938] AC 586, [1938] 2 All ER 602, HL, was based upon grounds of public policy. However, it is a general principle of insurance law that the insured cannot by his own deliberate act cause the event upon which the insurance money is payable: *Beresford v Royal Insurance Co Ltd* supra at 595 and at 604, obiter per Lord Atkin. But in that case the policy expressly included the risk of sane suicide; and, in such a case, the above general principle of insurance law could not be applied. In practice most modern life policies make express provision for suicide. In some cases the insurer specifically promises to pay on sane suicide once the policy has been in force for a number of years. See further INSURANCE.

12 As to indemnity against the civil consequences of a criminal act see notes 18-19 infra.

13 *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 (conspiracy leading plaintiff to commit offence; but plaintiff acted with gross negligence). None of the cases on this matter involves an express agreement to indemnify, eg by way of a contract of insurance. They involve either a claim in tort (see *Askey v Golden Wine Co Ltd* supra) or an action in respect of a breach of an implied term of a contract (as in *Cointat v Myham & Son* [1913] 2 KB 220; on appeal on another ground (1914) 84 LJB 2253, CA; and see note 14 infra). An express promise of an indemnity against criminal liability would run the risk of being totally illegal as applying alike to deliberate, negligent or innocent breaches of the criminal law. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE. For a case where membership of an association entitling disqualified drivers to certain benefits (including, in some circumstances, the use of a car and the services of a driver) amounted to an contract of insurance see *Department of Trade and Industry v St Christopher Motorists Association Ltd* [1974] 1 All ER 395, [1974] 1 WLR 99; and INSURANCE vol 25 (2003 Reissue) para 2.

14 *Crage v Fry* (1903) 67 JP 240; *Cointat v Myham & Son* [1913] 2 KB 220 (on appeal on another ground (1914) 84 LJB 2253, CA); *Gregory v Ford* [1951] 1 All ER 121; cf *Colburn v Patmore* (1834) 1 Cr M & R 73; *Fitzgerald v Leonard* (1893) 32 LR Ir 675; *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652; *Simon v Pawson and Leafs Ltd* (1932) 148 LT 154, CA. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE.

It has been held that where a person innocently commits an act which is a criminal offence as a result of a fraudulent misrepresentation by the defendant, he may maintain an action for deceit for personal injuries and loss of property suffered through his crime: *Burrows v Rhodes* [1899] 1 QB 816, DC.

15 *Shackell v Rosier* (1836) 2 Bing NC 634 (publication of libel); *WH Smith & Son v Clinton and Harris* (1908) 99 LT 840 (libel); *Haseldine v Hosken* [1933] 1 KB 822, CA (champerty; which is no longer a tort: see para 850 post); *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621, [1957] 2 All ER 844, CA (deceit).

16 Apart from express agreements to indemnify, a number of other legal principles are relevant here. First, the breach of an implied term of a contract may lead to an indemnity in respect of civil liability: see eg *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL; and EMPLOYMENT. As to implied terms in general see para 778 et seq ante. Secondly, at common law there exists a right of contribution or indemnity between concurrent tortfeasors where the act was not clearly illegal: see *Adamson v Jarvis* (1827) 4 Bing 66; and TORT. Thirdly, by statute the court has power to order contribution or indemnity between concurrent tortfeasors: see generally the Civil Liability (Contribution) Act 1978; RESTITUTION paras 81-82; and DAMAGES; TORT.

17 Any other rule would destroy the whole basis of liability insurance. For instances where liability insurance is compulsory see the Employers' Liability (Compulsory Insurance) Act 1969; and EMPLOYMENT; and the Road Traffic Act 1988; and ROAD TRAFFIC. See also generally INSURANCE. An agreement for indemnity against civil liability for libel in respect of the publication of any matter is not unlawful unless at the time of the publication the person claiming to be indemnified knows the matter is defamatory and does not reasonably believe there is a good defence to any action brought in respect of it: see the Defamation Act 1952 s 11; and LIBEL AND SLANDER vol 28 (Reissue) para 9.

18 *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327 ('motor manslaughter'); and see *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA. Though well established, it has been suggested that this principle is confined to road traffic cases: *Haseldine v Hosken* [1933] 1 KB 822 at 838, CA, obiter per Greer LJ; cf *Gray v Barr* [1971] 2 QB 554 at 581, [1971] 2 All ER 949 at 965, CA, obiter per Salmon LJ; but even before employers' liability insurance became compulsory (see note 17 supra) it never appears to have been suggested that an employers' liability policy was unenforceable where the employer had committed an offence under factory legislation involving himself in civil liability. See further INSURANCE; ROAD TRAFFIC.

See also *Marles v Philip Trant & Sons Ltd (No 2)* [1954] 1 QB 29, [1953] 1 All ER 651, CA (A bought wheat from B which did not comply with its description. A resold wheat to C, who recovered damages from A for non-compliance of wheat with its description. A was allowed to recover indemnity from B notwithstanding that in course of re-sale to C, A had committed a statutory offence).

19 *Gray v Barr* [1971] 2 QB 554, [1971] 2 All ER 949, CA (assault with loaded gun; gun going off accidentally); see further INSURANCE.

## **UPDATE**

### **840 Benefit from wrong-doing and indemnity against liability**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **(ii) Contracts Wholly or Partially Invalidated by Public Policy**

### ***A. THE MEANING OF PUBLIC POLICY***

#### **841. In general.**

Quite apart from the general principle which invalidates contracts involving a legal wrong<sup>1</sup>, the courts have developed a number of heads of public policy under which contracts may be illegal or void<sup>2</sup>. To some extent these categories overlap with the general principle previously referred to<sup>3</sup>, but they do not necessarily do so<sup>4</sup>. Contracts affected by public policy are classified in the following paragraphs according to the subject matter which they cover<sup>5</sup>.

1 See para 839 ante.

2 As to the distinction between void and illegal contracts see para 836 ante.

3 Thus certain agreements to conceal offences are themselves offences (see para 848 post), as are contracts to indemnify for bail (see para 849 post).

4 Thus there seems no possibility of any criminal or tortious liability in an agreement to oust the jurisdiction of the court (see para 856 post) or for the future separation of husband and wife (see para 864 post). Agreements involving maintenance and champerty straddle the two classes in that they were formerly criminal and tortious but are no longer so; however, agreements involving maintenance or champerty are still unenforceable (see para 850 post); but as to contingency fees see para 852 post.

5 See paras 844-866 post.



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## 842. Public policy.

Any agreement which tends to be injurious to the public or against the public good is invalidated on the grounds of public policy<sup>1</sup>. The relevant test is English public policy, but the court will give effect to international agreements incorporated into English law<sup>2</sup>; and, in considering whether to enforce a foreign judgment in this country, may decline to do so on the grounds that the contract was illegal in the country of performance<sup>3</sup>.

The question whether a particular agreement is contrary to public policy is a question of law, to be determined like any other by the proper application of prior decisions. It has been indicated that new heads of public policy will not be invented by the courts<sup>4</sup> for the following reasons: (1) judges are more to be trusted as interpreters of the law than as expounders of public policy<sup>5</sup>; and (2) it is important that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable<sup>6</sup>. However, the application of any particular ground of public policy may well vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise<sup>7</sup>. Conversely, many transactions are now upheld that in former times would have been considered against the policy of the law<sup>8</sup> (as with the treatment of atheism)<sup>9</sup>. The rule remains, but its application varies with the principles which for the time being guide public opinion<sup>10</sup>. In fact, the adaptability of the rules of public policy derives in large part from the generality, and even ambiguity, with which those rules are expressed<sup>11</sup>.

Public policy in this context must be distinguished from the policy of a particular government<sup>12</sup>.

1 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 196 per Lord Truro; *Hilton v Eckersley* (1855) 6 E & B 47 at 64 per Lord Campbell CJ; *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 151, CA, per Lord Esher MR, at 156 per Fry LJ; *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 491, HL, per Lord Halsbury LC. See further para 843 et seq post. Some such agreements are illegal (see paras 836 ante, 844-855, 858-860 post), others merely void (see paras 836 ante, 856, 857, 861-866 post).

2 *United City Merchants (Investments) Ltd v Royal Bank of Canada, The American Accord* [1983] 1 AC 168, [1982] 2 All ER 720, HL, where the court applied the Bretton Woods Agreement Order in Council 1946 to declare illegal such part of a documentary credit as breached the order.

3 *Soleimany v Soleimany* (1998) Times, 4 March, CA (contract to be performed in Iran where it was illegal; parties agreed arbitration under Beth Din law; and arbitrator made an award, whilst stating the illegality). See also the Arbitration Acts 1950-1996; and ARBITRATION.

4 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 106-107 per Alderson B, at 122-124 per Parke B; *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484 at 491, 492, HL, per Lord Halsbury LC; *Bowman v Secular Society Ltd* [1917] AC 406 at 427, 428, HL, per Lord Finlay LC (dissenting); cf *Egerton v Earl Brownlow* supra at 149-151 per Pollock CB, at 196-201 per Lord Truro; *Fender v St John-Mildmay* [1938] AC 1 at 11, 12, [1937] 3 All ER 402 at 407, HL, per Lord Atkin.

5 *Re Mirams* [1891] 1 QB 594 at 595 per Cave J; see also *Richardson v Mellish* (1824) 2 Bing 229 at 252 per Best CJ; *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 per Jessel MR.

6 *Fender v St John-Mildmay* [1938] AC 1 at 23, [1937] 3 All ER 402 at 407, HL, per Lord Atkin (the harm should not depend upon the idiosyncratic inferences of a few judicial minds). In *Armhouse Lee Ltd v Chappell* (1996) Times, 7 August, CA, which concerned advertisements for telephone sex lines, the court commented that whilst these might be distasteful, they were controlled by regulatory authorities and the court ought therefore not to regard them as immoral or against public policy.

7 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 149 per Pollock CB.

8 Eg agreements for immediate separation between husbands and wives (see para 864 post). There have been great changes by judicial activity in recent years in the principles of maintenance and champerty: see para 850 et seq post.

9 In 1867, it was held that a contract to hire a meeting hall to promote atheism was contrary to public policy (*Cowan v Milbourn* (1867) LR 2 Exch 230); but in 1917 this view was rejected (*Bowman v Secular Society Ltd* [1917] AC 406, HL).

10 *Evanturel v Evanturel* (1874) LR 6 PC 1 at 29; *Naylor, Benzon & Co v Krainische Industrie Gesellschaft* [1918] 1 KB 331 at 342 per McCardie J; affd [1918] 2 KB 486, CA.

11 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 331, 332, [1967] 1 All ER 699 at 728, 729, HL, per Lord Wilberforce citing *Standard Oil Co of New Jersey v United States* 221 US 1 at 63 (USA SC 1910) per White CJ.

12 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 196 per Lord Truro; *Monkland v Jack Barclay Ltd* [1951] 2 KB 252, [1951] 1 All ER 714, CA; cf *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301, [1957] 3 All ER 286, HL. It must also be distinguished from the even less precise principles of policy which guide the courts in negligence actions on the imposition of a duty of care: see *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294, HL; and *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL; and NEGLIGENCE.

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### **843. Miscellaneous agreements contrary to public policy.**

The principal classes of agreements offending public policy are considered under various heads in the subsequent paragraphs<sup>1</sup>. The following agreements which do not easily fit under those heads have also been held to be contrary to public policy: an agreement by a newspaper, carrying on the business of advising investors in land, not to publish any comment upon its creditor's company or business<sup>2</sup>; an agreement for a pretended assault and subsequent summons for purposes of advertisement<sup>3</sup>; a contract improperly fettering a borrower's liberty of action and disposal of his property<sup>4</sup> or depriving him of his sole means of support<sup>5</sup>; a contract involving the commission of an offence in a foreign and friendly country<sup>6</sup>.

On the other hand, the following agreements have been held not to offend against public policy: an agreement by a mercantile agency to supply a subscriber with confidential reports of the financial position of traders, the subscriber to indemnify the agency against loss or damage through breach of confidence by the subscriber<sup>7</sup>; and an agreement by a father to pay the debts of his spendthrift son in consideration of the assignment of the son's property to him, the son covenanting to reform his way of living and not to live within a prescribed area<sup>8</sup>.

1 See para 844 et seq post.

2 *Neville v Dominion of Canada News Co Ltd* [1915] 3 KB 556, CA. It is not clear whether the court considered the agreement illegal or void (as to the distinction see para 836 ante), though it disapproved of it in the strongest terms.

3 *Dann v Curzon* (1910) 104 LT 66. The contract was probably illegal rather than merely void (see para 836 ante).

4 *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, CA. It is submitted that this contract, and that in note 5 infra were void, not illegal (see para 836 ante).

5 *King v Michael Faraday & Partners Ltd* [1939] 2 KB 753, [1939] 2 All ER 478. See also *Syrett v Egerton* [1957] 3 All ER 331, [1957] 1 WLR 1130.

6 *Foster v Driscoll* [1929] 1 KB 470, CA; *Ispahani v Bank Melli Iran* (1997) Times, 29 December, CA. As to treatment as frustration see para 902 post.

7 *Bradstreets British Ltd v Mitchell and Carapanayoti & Co* [1933] Ch 190.

8 *Denny's Trustee v Denny and Warr* [1919] 1 KB 583.

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## **B. AGREEMENTS INJURIOUS TO PUBLIC LIFE**

### **844. Interference with legislative process or with elections.**

An agreement which tends to interfere with the free and proper exercise of the franchise is contrary to public policy<sup>1</sup>. The same applies to any agreement tending corruptly to influence members of the legislature<sup>2</sup> or of a local authority<sup>3</sup> or any public officer<sup>4</sup>, or tending to cause a public officer to neglect his duty<sup>5</sup> or whereby a person exercises his position and influence to procure a benefit from the government<sup>6</sup>.

On the other hand, a member of the legislature has a right to bargain in his capacity as an individual for compensation for injury to his property in consideration of his giving support or withdrawing opposition to a proposed bill, so long as the bargain is not secret<sup>7</sup>. Furthermore, where a person is entitled to give his votes as he pleases, in a matter not affecting the interests of the public, as for example in the case of a subscriber to a charity, there is nothing contrary to public policy in a bargain between two subscribers to vote for particular candidates<sup>8</sup>.

The contracts dealt with in this and the following two paragraphs<sup>9</sup> are illegal, not merely void<sup>10</sup>.

1 *Allen v Hearn* (1785) 1 Term Rep 56 (wager with voter as to election of a member); *Coppock v Bower* (1838) 4 M & W 361 (agreement for withdrawal of election petition against return of member on ground of bribery, in consideration of a monetary payment); *Cooper v Slade* (1858) 6 HL Cas 746 (bribery by sub-agent at election); *Wallis v Duke of Portland* (1798) 8 Bro Parl Cas 161, HL (agreement as to costs of election petition).

2 *Lord Howden v Simpson* (1839) 10 Ad & El 793 at 821, Ex Ch, per Tindal CJ; affd sub nom *Simpson v Lord Howden* (1842) 9 Cl & Fin 61, HL. See also the speech of Lord Shaw of Dunfermline in *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87, HL. Cf note 7 infra.

3 This would seem to be so by analogy with the principle in the text to note 2 supra. A member of a local authority is required to disclose his interest in a contract to be entered into by the local authority: see the Local Government Act 1972 s 94 (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARAS 286-289. See also *R v Newham London Borough Council, ex p Haggerty* (1987) 85 LGR 48; *Readman v Payne* (1991) 23 HLR 326, DC. Corrupt practices by or in relation to a member of a public body (including a local authority) constitute offences under the Prevention of Corruption Acts 1889-1916: see eg *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65, [1972] 1 WLR 118, CA; and see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 521, 529-530.

4 It is an offence at common law for a public officer to accept a bribe or show favour: *R v Whitaker* [1914] 3 KB 1283, CCA; and see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 528. Corrupt practices by or in relation to a servant of a public body (including a local authority) constitute offences under the Prevention of Corruption Acts 1889-1916: see note 3 supra; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 521, 529-530. An officer of a local authority is under a duty to disclose his interest in a contract to be entered into by the local authority: see the Local Government Act 1972 s 117 (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARA 440. Whatever may be the position at common law in respect of employees or agents of persons other than public bodies (cf notes 2-3 supra) corrupt transactions involving agents are offences under the Prevention of Corruption Act 1906 (see further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 321) and such transactions would clearly be unenforceable: see *DPP v Holly* [1978] AC 43, [1977] 1 All ER 316, HL.

5 *Hughes v Statham* (1825) 4 B & C 187; cf *Savill Bros Ltd v Langman* (1898) 79 LT 44, CA; and see *Arkwright v Cantrell* (1837) 7 Ad & El 565.

6 *Montefiore v Munday Motor Components Co Ltd* [1918] 2 KB 241.

7 *Simpson v Lord Howden* (1842) 9 Cl & Fin 61, HL; *Earl Lindsey v Great Northern Rly Co* (1853) 10 Hare 664; *Earl of Shrewsbury v North Staffordshire Rly Co* (1865) LR 1 Eq 593. By parliamentary convention, a member of the legislature would be expected to declare his interest if he proposed to speak to any matter in the House of which he was a member thus ensuring that private arrangements, such as those mentioned in the text, were not kept secret. Failure to do so would be regarded as a breach of parliamentary privilege. As to the appointment of a Parliamentary Commissioner for Standards see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 211. Note also the position of a member of a local authority who may not vote on or take part in the consideration of a contract in which he has (subject to certain exceptions) either a direct or indirect interest: see the Local Government Act 1972 s 94 (as amended); s 95; note 3 supra; and LOCAL GOVERNMENT vol 69 (2009) PARAS 286-289.

An agreement between rival companies for the withdrawal of opposition to a bill introduced into Parliament for the lease of a railway in consideration of the division of profits was held valid: *Shrewsbury and Birmingham Rly Co v London and North Western Co and Shropshire Union Rlys and Canal Co* (1851) 17 QB 652.

8 *Bolton v Madden* (1873) LR 9 QB 55.

9 See paras 844-846 post.

10 As to the consequences of the distinction between void and illegal contracts see para 836 ante.

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### **845. Sale etc of public offices.**

A public office<sup>1</sup> is deemed to be a position of public trust, and, even apart from statutory restrictions<sup>2</sup>, a contract for the sale or resignation of such an office is contrary to public policy and cannot be enforced<sup>3</sup>. The sale of a recommendation to a public office, or an agreement by a person for pecuniary reward to use his influence in order to obtain such an office for another, is unenforceable on the same ground<sup>4</sup>. An assignment of, or charge on, the salary or emoluments of such an office is also against public policy, for the presumption is that these are required for the purpose of upholding the dignity of the office and enabling the holder of it to perform his duties in a proper manner<sup>5</sup>. This principle, however, applies only where the office is in some way connected with the public service and the salary is paid out of national funds<sup>6</sup>, and it has no application in cases where the office is a sinecure or the duties attached to it have ceased<sup>7</sup>.

On the same principle, the assignment or charging of a pension given for the support of a peerage or other dignity is contrary to public policy<sup>8</sup>.

1 The meaning of 'public office' for this purpose is not entirely clear. The captain of a ship in the East India Company's service was held to have a public office in *Blachford v Preston* (1799) 8 Term Rep 89. Quaere whether any employees of statutory corporations, such as the Post Office, or agencies such as the DVLA, which are not departments of government, are within this term. As to the status of statutory corporations see *Tamlin v Hannaford* [1950] 1 KB 18, CA; and CORPORATIONS; STATUTES.

2 See the Sale of Offices Act 1551; Sale of Offices Act 1809. See also *R v Charretie* (1849) 13 QB 447; *Layng v Paine* (1745) Willes 571; *Godolphin v Tudor* (1703) 2 Salk 468; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 535.

3 Co Litt 234a; *Hanington v Du-Chatel* (1781) 1 Bro CC 124; *Garforth v Fearon* (1787) 1 Hy Bl 328; *Parsons v Thompson* (1790) 1 Hy Bl 322; *Blachford v Preston* (1799) 8 Term Rep 89; *Card v Hope* (1824) 2 B & C 661; *Richardson v Mellish* (1824) 2 Bing 229; *Waldo v Martin* (1825) 4 B & C 319; *Hopkins v Prescott* (1847) 4 CB 578; *Graeme v Wroughton* (1855) 11 Exch 146; *Eyre v Forbes* (1862) 12 CBNS 191.

4 *Hartwell v Hartwell* (1799) 4 Ves 811.

5 *Methwold v Walbank* (1761) 2 Ves Sen 238; *Flarty v Odlum* (1790) 3 Term Rep 681; *Parsons v Thompson* (1790) 1 Hy Bl 322; *Barwick v Reade* (1791) 1 Hy Bl 627; *Lidderdale v Duke of Montrose* (1791) 4 Term Rep 248; *Palmer v Bate* (1821) 2 Brod & Bing 673; *Wells v Foster* (1841) 8 M & W 149; *Liverpool Corp v Wright* (1859) 28 LJ Ch 868; *Apthorpe v Apthorpe* (1887) 12 PD 192, CA; *M'Creery v Bennett* [1904] 2 IR 69. Such assignments are also sometimes rendered void by statute: see eg the Army Act 1955 s 203; the Air Force Act 1955 s 203; and *Walker v Walker* [1983] Fam 68, [1983] 2 All ER 909; *Roberts v Roberts* [1986] 2 All ER 483, [1986] 1 WLR 437; *Ranson v Ranson* [1988] 1 WLR 183, CA; *Happé v Happé* [1991] 4 All ER 527, [1990] 1 WLR 1282, CA; *Thomson v Thomson* 1991 SCLR 655; and ARMED FORCES. See further CHOSSES IN ACTION vol 13 (2009) PARA 94 et seq. Quaere whether contracts infringing this head of public policy at common law are properly illegal or merely void.

6 See *Re Mirams* [1891] 1 QB 594 (principle did not apply to salary paid out of local rates).

7 *Grenfell v Dean and Canons of Windsor* (1840) 2 Beav 544.

8 *Davis v Duke of Marlborough* (1818) 1 Swan 74; and see para 846 post.

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#### **846. Obtaining titles.**

A contract for the purchase of a title is against public policy and is an illegal contract however the money paid under such a contract is to be expended<sup>1</sup>; and a disposition of property which is made subject to a condition that the beneficiary should use it to obtain a title of honour for which he might be unfit on grounds of merit or otherwise is also contrary to public policy as being mischievous to the community at large<sup>2</sup>.

1 *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1 (money paid to a charity upon an undertaking that donor should receive a knighthood; money not recoverable). The parties to such a contract would now be guilty of an offence under the Honours (Prevention of Abuses) Act 1925: see PEERAGES AND DIGNITIES vol 79 (2008) PARA 802.

2 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 (condition requiring the acquisition of dukedom or marquise). Such a condition was considered to furnish motives for conduct which was independent of a sense of public duty. But a gift conditional upon the acquisition of a baronetcy does not infringe public policy for, it has been said, a baronet has no particular public duties: *Re Wallace, Champion v Wallace* [1920] 2 Ch 274, CA.

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### **C. FOREIGN AFFAIRS**

#### **847. Contracts with a foreign element.**

In addition to its statutory prohibition<sup>1</sup>, trading with the enemy in time of war is against public policy and contracts made with such a purpose are illegal<sup>2</sup>. Similarly, a contract which has as its object the assistance of insurgents against a government in friendly relations with the United Kingdom is illegal<sup>3</sup>.

As a general rule, the courts of this country will not enforce a contract illegal by the law of the country in which it is to be performed<sup>4</sup> or by the proper law of the contract<sup>5</sup>. The courts will not be influenced by a mere matter of public policy in such a country, unless it coincides with public policy in this country. In such a case the contract will not be enforced<sup>6</sup>.

1 As to the statutory prohibition of trading with the enemy see the Trading with the Enemy Act 1939; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) para 576.

2 See *Ertel Bieber & Co v Rio Tinto Co* [1918] AC 260, HL; and WAR AND ARMED CONFLICT.

3 See *De Wutz v Hendricks* (1824) 2 Bing 314; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 16. Fitting out or participating in an expedition against a foreign state may also constitute an offence against the Foreign Enlistment Act 1870; see COMMONWEALTH vol 13 (2009) PARA 841; WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) paras 412-414.

4 See CONFLICT OF LAWS vol 8(3) (Reissue) para 359. See also para 902 post.

5 See CONFLICT OF LAWS vol 8(3) (Reissue) para 362 et seq. For the situation where the contract is lawful by the proper law or the law of place of performance, but conflicts with a principle of English public policy or a statute having extra-territorial operation, see CONFLICT OF LAWS vol 8(3) (Reissue) para 349 et seq.

6 *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, [1988] 1 All ER 513; and see para 902 post.



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## **D. ADMINISTRATION OF JUSTICE**

### **848. Concealing offences.**

The common law offences of compounding<sup>1</sup> a felony or misdemeanour<sup>2</sup> have been abolished<sup>3</sup>; but it is still a crime, in relation to an arrestable offence<sup>4</sup>, to accept or agree to accept any consideration (other than the making good of the loss caused by the offence) for not disclosing information in relation to that offence<sup>5</sup>. It is an offence to advertise for the return of stolen property with no questions asked<sup>6</sup>.

The enforceability of agreements to conceal offences is not, however, entirely clear. It is certain that an agreement not to give information as to treason, or an agreement which contravenes the above-mentioned provision as to arrestable offences, is not enforceable, since in either case the agreement amounts to a criminal offence<sup>7</sup>. At common law, however, an agreement to stifle or withdraw from a prosecution in respect of a misdemeanour<sup>8</sup> of a public<sup>9</sup>, as opposed to a private<sup>10</sup>, nature is against public policy, because the effect of it is to take the administration of the law out of the hands of the courts and to put it into the hands of a private individual to determine what is to be done in the particular case<sup>11</sup>. This rule probably remains the law even where the agreement does not constitute an offence under the above-mentioned provision concerning arrestable offences, since the rule seems to depend upon the courts' role in the protection of the public interest and not upon the agreement itself constituting an offence<sup>12</sup>.

Notwithstanding the probable survival of the common law rule as to compromises of offences of a public nature, there is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by the threat of prosecution<sup>13</sup>, so long as there is no agreement, either express or necessarily implied, not to prosecute<sup>14</sup>.

1 To agree for consideration not to prosecute, or to impede the prosecution of, an offence: see *Sykes v DPP* [1962] AC 528 at 561, 562, [1961] 3 All ER 33 at 41, HL, per Lord Denning.

2 The distinction between felonies and misdemeanours is now abolished: see the Criminal Law Act 1967 s 1.

3 Ibid s 5(5). The common law offence of compounding treason remains: s 5(5).

4 For the meaning of 'arrestable offence' see the Police and Criminal Evidence Act 1984 s 24(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 703.

5 See the Criminal Law Act 1967 s 5(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 734.

6 See the Theft Act 1968 s 23 (as substituted); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 305.

7 As to contracts to commit a crime see para 839 ante.

8 Since an agreement to compound a felony was itself an offence (see text and notes 1-2 supra), no such agreement could be enforceable, whether the offence compounded was of a public nature or not: *Rowland v Simons* (1850) 15 LTOS 231. See also note 2 supra.

9 *Collins v Blanton* (1767) 2 Wils 341 (bond in consideration of suppression of evidence at trial for perjury); *Edgcombe v Rodd* (1804) 5 East 294 (offence against the Toleration Act 1688 (repealed)); *Keir v Leeman* (1846) 9 QB 371, Ex Ch (compromise of an indictment for riot and assault upon a constable); *Clubb v Hutson* (1865) 18

CBNS 414 (promissory note in consideration of not prosecuting for obtaining by false pretences); *Brook v Hook*(1871) LR 6 Exch 89 (agreement to honour forged signature in consideration of forbearance to prosecute forger); *Re Campbell, ex p Wolverhampton Banking Co*(1884) 14 QBD 32 (payment to bank to stifle prosecution for obtaining credit by false pretences). The last three cases might seem to suggest that anything involving dishonesty is 'of a public nature'. See also *Windhill Local Board of Health v Vint*(1890) 45 ChD 351, CA (compromise of indictment for non-repair of highway).

10 *Elworthy v Bird* (1825) 2 Sim & St 372 (agreement for separation of husband and wife on compromise of indictments for assault) (contra *Garth v Earnshaw* (1839) 3 Y & C Ex 584); *Fisher & Co v Apollinaris Co*(1875) 10 Ch App 297 (compromise of criminal proceedings under the former Merchandise Marks legislation); and see *Beeley v Wingfield* (1809) 11 East 46; *Baker v Townsend* (1817) 7 Taunt 422; *Davies v London and Provincial Marine Insurance Co*(1878) 8 ChD 469. See also *Lamson Paragon Supply Co Ltd v MacPhail*1914 SC 73, where doubt was expressed whether an agreement by an employer not to prosecute an employee who had embezzled money, if he paid back the money to him, was *pactum illicitum*, an illegal agreement, by the law of Scotland.

11 If done at a very late stage this may amount to a contempt of court (as to which see generally CONTEMPT OF COURT).

12 Cf the Seventh Report of the Criminal Law Revision Committee (Cmnd 2659) (1965) para 38. (It is doubtful whether compounding a misdemeanour of a public nature was in fact an offence at common law.)

It has also been said that, where the commission of an offence gives a right of action for damages to a party injured, it is competent for him to compromise his claim for damages in any way that he thinks fit and that therefore, wherever in the case of a misdemeanour the person injured has the choice between a civil and criminal remedy, a compromise of criminal proceedings is not contrary to public policy: *Fisher & Co v Apollinaris Co*(1875) 10 Ch App 297. While this view is no doubt true of the civil action it is expressed too widely in relation to the criminal prosecution, for it ignores the distinction drawn between 'public' and 'private' offences: see *Windhill Local Board of Health v Vint*(1890) 45 ChD 351, CA; *Kerridge v Simmonds* (1906) 4 CLR 253 (Aust HC). See also note 2 supra.

13 See, however, the Administration of Justice Act 1970 s 40 (as substituted) (unlawful harassment); and *North Yorkshire Trading Standards Department v Williams*(1995) 159 JP 383, (1994) Times, 22 November.

14 *Ward v Lloyd* (1843) 6 Man & G 785 (warrant of attorney given to secure a debt); cf *Ex p Critchley* (1846) 3 Dow & L 527; *Wallace v Hardacre* (1807) 1 Camp 45 (indorsee of forged bill of exchange, receiving another bill in consideration of its delivery up); *Re Mapleback, ex p Caldecott*(1876) 4 ChD 150, CA (bill of sale given in consideration of the grantee's paying to the grantor's bankers the amount of a forged bill of exchange); *Flower v Sadler*(1882) 10 QBD 572, CA (mere abstention from prosecution); and see *Haywood v Whitaker* (1887) 3 TLR 537 (acceptance of security from third person not rendered illegal by mere fact that creditor thereby induced to abstain from prosecuting the debtor, although the debtor may have been given into custody by the creditor with a view to being criminally prosecuted).

As to fraudulent preferences see para 839 ante.

## UPDATE

### 848 Concealing offences

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 4--1984 Act s 24 (as substituted by the Serious Organised Crime and Police Act 2005 s 110(1)) now contains a general power of arrest without warrant, based on a test of necessity, in relation to any offence.

NOTE 13--Administration of Justice Act 1970 s 40 amended: SI 2008/1277.

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### **849. Indemnifying bail.**

Where a defendant in a criminal case has been ordered to find bail, a promise given either by him or by a third person to indemnify his surety against liability on his recognisances is illegal<sup>1</sup>, because it deprives the public of the protection which the law affords for securing the appearance or good behaviour of the defendant<sup>2</sup>.

<sup>1</sup> See the Bail Act 1976 s 9 (as substituted) (which codifies the common law rule); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1201.

<sup>2</sup> *Herman v Jeuchner* (1885) 15 QBD 561, CA; *Consolidated Exploration and Finance Co v Musgrave* [1900] 1 Ch 37. The parties to such an agreement are also guilty of conspiracy, even though no intention to frustrate justice is shown: *R v Porter* [1910] 1 KB 369; disapproving *R v Broome, ex p Staden* (1851) 18 LTOS 19 and *R v Stockwell* (1902) 66 JP 376. As to conspiracy in general see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 66 et seq.

See also *Re Gurwicz, ex p Trustee* [1919] 1 KB 675 (indemnification of sureties to secure attendance of debtor for examination). But there was nothing unlawful in an agreement by the next-of-kin to indemnify sureties to an administration bond: *Blake v Bayne* [1908] AC 371, PC (administration bonds have now been abolished, but the court has power to require sureties: see the Supreme Court Act 1981 s 120; and EXECUTORS AND ADMINISTRATORS).

### **UPDATE**

### **849 Indemnifying bail**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 850. Agreements involving maintenance or champerty.

Maintenance<sup>1</sup> may be defined as the giving of assistance or encouragement to one of the parties to litigation<sup>2</sup> by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty<sup>3</sup> is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action<sup>4</sup>.

Since 1967 both criminal<sup>5</sup> and tortious<sup>6</sup> liability for maintenance and champerty have been abolished<sup>7</sup>; but the abolition of these forms of liability does not affect any rule of law as to the cases in which a contract involving maintenance or champerty is to be treated as contrary to public policy or otherwise illegal<sup>8</sup>. Accordingly, it continues to be necessary to treat maintenance and champerty in detail, notwithstanding that most of the cases involve the now defunct tortious liability<sup>9</sup>.

1 'Maintenance, *manutenentia*, is derived from the verb *manutenere*, and signifieth in law a taking in hand, bearing up, or upholding of quarrels and sides, to the disturbance or hindrance of common right': Co Litt 368b. It is 'when one maintaineth the one side without having any part of the thing in plea or suit': Co Litt 369a. See also 1 Hawk PC (8th Edn) 454, 2 Co Inst 212, 4 Bl Com c 10 s 12, and other definitions referred to in *Bradlaugh v Newdegate* (1883) 11 QBD 1; *Grant v Thompson* (1895) 72 LT 264; *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65, CA; and the various cases cited *infra*. According to Coke (2 Co Inst 212), maintenance might be by word, writing, countenance or deed; and merely to volunteer evidence might have been regarded as maintenance: *Master v Miller* (1791) 4 Term Rep 320 at 340. At the present day, however, it is unlikely that anything short of pecuniary assistance would be considered illegal. See further para 851 post.

As to maintenance in the sense of financial provision for spouses and children see para 857 post.

2 The rules of maintenance and champerty apply to litigation generally and not merely to actions or suits in the strict sense: *Re Trepca Mines Ltd (No 2)* [1963] Ch 199, [1962] 3 All ER 351, CA (proof in liquidation of company). But cf *Saville Bros Ltd v Langman* (1898) 79 LT 44, CA (application to licensing justices who are not considered to be sitting as a court and before whom there is no contest); and see para 851 note 2 post.

3 So called from *campi partitio* (a division of the land), but the doctrine is not confined to actions relating to realty: 1 Hawk PC (8th Edn) 463. 'The unlawful maintenance of a suit in consideration of some bargain to have ... some profit out of it': *Stanley v Jones* (1831) 7 Bing 369 per Tyndall CJ. The origins of champerty go back so far 'that their origins can no longer be traced': *Giles v Thompson, Devlin v Baslington* [1994] 1 AC 142 at 153, [1993] 3 All ER 321 at 350, HL, per Lord Mustill. See also the discussion of champerty in *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65, CA. However, they seem in fact to date from the fourteenth century where it was a taking over of actions by those with power before less than independent courts and therefore seen as an abuse of process and an encouragement to unwarranted litigation. In the nineteenth century, however, it was more frowned upon as a device to get something of value out of some poor person who had a right they could not afford to litigate. As a result they were usually prepared to make an 'improvident bargain': see *Hutley v Hutley* (1873) LR 8 QB 112; and *Rees v De Bernady* [1896] 2 Ch 437. Modern champerty has been described as 'a wanton and officious intermeddling without justification or excuse': *Giles v Thompson, Devlin v Baslington* supra at 161 and at 357 per Lord Mustill.

4 'Champerty is a species of maintenance and therefore it is convenient to use the phrase 'champertous maintenance', distinguishing it from simple maintenance, in which the element of champerty is not present': *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 226, [1962] 3 All ER 351 at 359, CA, obiter per Pearson LJ. 'Every champerty is maintenance': 2 Roll Abr 119r; *Hickman v Kent or Romney Marsh Sheepbreeders' Association* (1920), as reported in 151 LT Jo 5, CA. In paras 851-855 post, except where the context otherwise requires, 'maintenance' means both simple maintenance and champertous maintenance.

5 See the Criminal Law Act 1967 s 13, Sch 4.

6 See *ibid* s 14(1).

7 Maintenance was a misdemeanour at common law and was also punishable by various statutes. Further, a person who was a common mover, exciter or maintainer of suits or quarrels was guilty of the offence of barratry, but this offence has also been abolished by *ibid* s 13(1).

Maintenance gave rise to liability in tort at the suit of the person injured as a result of the action (though the tort was not actionable *per se*: *Neville v London Express Newspaper Ltd* [1919] AC 368, HL). Any agreement constituting or savouring of maintenance was illegal and unenforceable: *Reynell v Sprye* (1852) 1 De GM & G 660. See further para 855 post.

8 See the Criminal Law Act 1967 s 14(2). It is fairly clear that although they no longer constitute crimes or torts, agreements involving maintenance are illegal, not merely void. As to this distinction see para 836 ante.

9 As to the effect of maintenance on contracts see para 855 post.

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### **851. What amounts to maintenance.**

The doctrine of maintenance is based upon considerations of public policy<sup>1</sup>, and is directed against wanton and officious intermeddling with the disputes of others in which the maintainer has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse<sup>2</sup>. Here as elsewhere, however, notions of public policy change with the passage of time and the present doctrine of maintenance is due to an attempt to carve out of the old law so much of it as is in keeping with modern notions of public policy<sup>3</sup>. Accordingly, great care must be taken in using older cases, even though, strictly speaking, they have not been overruled. The House of Lords has held that arrangements involving a company hiring a car to the plaintiff in a road accident case and then effectively taking over the case and attempting to recover the car hire cost in the plaintiff's name are not champertous as such agreements do not have 'the tendency to corrupt public justice'<sup>4</sup>. Similarly, since it became lawful for solicitors to charge conditional fees<sup>5</sup>, doing so within the statutory terms will not constitute champerty<sup>6</sup>.

The following have been held to constitute maintenance<sup>7</sup>: the providing of money by a director to enable an expert to bring a libel action in respect of adverse criticisms by a newspaper upon a report made by the expert as to certain appliances sold by the director's company<sup>8</sup>; the bringing of an action by a trade union in the name of a member against his employer in respect of an alleged libel on the member contained in a letter to the union's secretary<sup>9</sup>; and the bringing of an action by a society in the name of one of its inspectors in respect of an alleged slander against him<sup>10</sup>. Similarly, an assignment of a bare right of action has been held to constitute champerty<sup>11</sup>. Even where the original assignment might not have been bare because of a claim of interest, a resale to a third party will inevitably indicate champerty<sup>12</sup>.

1 *Alabaster v Harness* [1895] 1 QB 339 at 342, CA, per Lord Esher MR; *Wallis v Duke of Portland* (1797) 3 Ves 494.

2 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014, CA, per Fletcher Moulton LJ. As to justification see paras 853-854 post.

3 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1013, CA, per Fletcher Moulton LJ; see the observations of Danckwerts J in *Martell v Consett Iron Co Ltd* [1955] Ch 363, [1954] 3 All ER 339 (affd [1955] Ch 363 at 389, [1955] 1 All ER 481, CA); and of the Court of Appeal in *Hill v Archbold* [1968] 1 QB 686, [1967] 3 All ER 110, CA; and *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65, CA.

4 *Giles v Thompson; Devlin v Baslington* [1994] 1 AC 142, [1993] 3 All ER 321, HL. 'Is there any realistic possibility that the administration of justice may suffer? ... none so far as I can see': per Lord Mustill at 164 and 360.

5 See para 852 post.

6 See *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1998] 3 All ER 238.

7 As to cases involving champerty see notes 9-10 infra.

8 *Alabaster v Harness* [1895] 1 QB 339, CA.

9 *Greig v National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1906) 22 TLR 274; see also *Oram v Hutt* [1914] 1 Ch 98, CA. Note, however, that grave doubt was cast upon *Oram v Hutt* supra in *Hill v Archbold* [1968] 1 QB 686, [1967] 3 All ER 110, CA.

10 *Scott v National Society for Prevention of Cruelty to Children and Parr* (1909) 25 TLR 789.

11 *Glegg v Bromley* [1912] 3 KB 474, CA; and see CHOSSES IN ACTION vol 13 (2009) PARAS 98-99. This general rule is subject to the following exceptions: (1) it does not apply to assignments of debts; (2) it does not apply if the assignment of the right to litigate is subsidiary to a transfer of property; and (3) even bare rights of action are assignable by a trustee in bankruptcy.

There is a statutory exemption to the sale of bare rights of action for a consideration given to trustees in bankruptcy and liquidators under the Insolvency Act 1986 ss 165, 66, Sch 4 para 6; see generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY. This does not extend to agreements whereby third parties agree to finance litigation by the insolvent person in return for a share of the proceeds. Such an agreement is champertous: *Groveswood Holdings plc v James Capel & Co Ltd* [1995] Ch 80, [1994] 4 All ER 417. Similarly, an agreement to finance a liquidator to bring an action under the Insolvency Act 1986 s 214 against the directors of an insolvent company is champertous, at least where the agreement gives the party some right of control over the action: *Re Oasis Merchandising Services Ltd* [1998] Ch 170, sub nom *Re Oasis Merchandising Services Ltd (In Liquidation)*, *Ward v Aitken* [1997] 1 All ER 1009, CA.

12 *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL.

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## 852. Contingency fees.

An agreement to supply funds or legal assistance for litigation in return for a share in the proceeds is champertous<sup>1</sup>. A facet of this type of champerty is to make unlawful the charging of contingency fees<sup>2</sup>, and the making of a retainer agreement with differential fees depending on the outcome of the case<sup>3</sup> before a court or arbitration tribunal<sup>4</sup>.

However, it has been held that a conditional fee agreement was not unlawful where the proceedings were before a local valuation court, since this was administration not litigation and the court was not to be regarded as a court of law<sup>5</sup>. Similarly, a surveyor's contingency fee agreement for appearing before a planning inquiry was held not to be champertous<sup>6</sup>. The position of actions before tribunals is unclear.

The changing moral and financial climate has dictated that certain conditional fee agreements charged by solicitors have been given statutory authorisation and are now normal practice<sup>7</sup>. Thus personal injury actions and actions concerned with the winding up of a company may now be conducted on a 'no win no fee' basis<sup>8</sup>. However, solicitors are not permitted to take a proportion of the proceeds, but may only agree their normal fee subject to a maximum increase of one hundred per cent<sup>9</sup>.

There is, however, nothing illegal in an agreement merely to give information on terms of getting a share of any property to be recovered as a result, provided that the giver of that information is to take no part in the action for recovery of the property<sup>10</sup>.

1 *Haseldine v Hosken* [1933] 1 KB 822, CA; *James v Kerr* (1889) 40 ChD 449, and the cases there cited: *Earle v Hopwood* (1861) 30 LJCP 217; *Strange v Brennan* (1846) 15 LJ Ch 389, CA; *Wood v Downes* (1811) 18 Ves 120; *Hilton v Woods* (1867) LR 4 Eq 432; *Re A Solicitor, ex p Law Society* [1912] 1 KB 302; *Re A Solicitor, ex p Law Society* (1913) 29 TLR 354; *Cole v Booker* (1913) 29 TLR 295; *Ford v Radford* (1920) 36 TLR 658; cf *Re Hoggart's Settlement* (1912) 56 Sol Jo 415.

As to champerty see para 850 ante.

2 *James v Kerr* (1889) 40 ChD 449; and *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA. As to contingency fees see LEGAL PROFESSIONS vol 66 (2009) PARA 955.

3 *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695.

4 *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1998] 3 All ER 238, [1998] 3 WLR 172.

5 *Pickering (t/a City Agents) v Sogex Services (UK) Ltd* [1982] 1 EGLR 42, [1982] Abr para 564.

6 *Picton Jones & Co v Arcadia Developments Ltd* [1989] 1 EGLR 43.

7 See the Courts and Legal Services Act 1990 s 58; and LEGAL PROFESSIONS vol 66 (2009) PARA 953. Section 58 does not extend to arbitrations: *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1998] 3 All ER 238, [1998] 3 WLR 172.

8 *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65, CA; *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1998] 3 All ER 238, [1998] 3 WLR 172. As to the proposed extension of conditional fees to all categories of cases except criminal and family cases, and the proposed phasing out of the availability of legal aid in cases where conditional fees are permitted, see the Lord Chancellor's Department consultation paper *Access to Justice with Conditional Fees* (1988) and [1988] NLJ 322, 358, 917.

9 See the Conditional Fee Agreements Order 1995, SI 1995/1674, art 3.



10 *Spyre v Porter* (1856) 7 E & B 58; *Stanley v Jones* (1831) 7 Bing 369; *Hutley v Hutley* (1873) LR 8 QB 112. Where however the agreement involves court action it is champertous. Thus in the Irish case of *Fraser v Buckle* [1996] 2 IRLM 34, the Irish Supreme Court decided that under English law an heir locator who conducted proceedings on a US will and was to divulge the name of the deceased to potential beneficiaries for a share of the proceeds had made a champertous agreement. The court may go behind a written agreement and draw its own conclusions as to the parties' intentions: *Rees v De Bernardy* [1896] 2 Ch 437.

## UPDATE

### 852 Contingency fees

NOTES--An arrangement that provides that solicitors costs are only payable in the event of a successful prosecution contravenes the Solicitors Practice Rules r 8 and is therefore unenforceable: *Wells v Barnsley MBC*; *Leeds CC v Carr* [2000] COD 10, DC. As a matter of common law, it is contrary to public policy for a solicitor to act for a client in pursuance of a conditional normal fee agreement in circumstances which are not sanctioned by statute: *Awwad v Geraghty & Co* [2001] QB 570, [2000] 1 All ER 608, CA. See *Burstein v Times Newspapers Ltd (No 2)* [2002] EWCA Civ 1739, (2002) Times, 6 December (retainer agreement did not become champertous after solicitor discovered client impecunious and unable to pay fees).

NOTE 1--See, however, *R (on the application of Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381 (litigation services relating to assessment of damages provided by firm of accountants on a contingency basis not champertous).

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### **853. Justification: common interest.**

There is no objection to the support of legal proceedings based on a bona fide community of pecuniary interest or religion or principles or problems<sup>1</sup>; and this will extend to cases where there is a reasonable belief in such community of interest<sup>2</sup>. An interest in this context means an interest recognised by law in the subject matter of the action or some issue between the parties to the action<sup>3</sup>, and not merely in matters incidentally connected with it<sup>4</sup>.

One of the most important aspects of common interest is insurance policies. Because of the prior payment of a premium, it has been held that an insurer has a legitimate common interest in any action between the policy-holder and a third party and may therefore maintain the action<sup>5</sup>.

In the following cases<sup>6</sup> it has been held or said that sufficient community of interest existed: between an angling association and its members in respect of litigation concerning river pollution<sup>7</sup>; between a remainderman or reversioner and the tenant in tail or life tenant<sup>8</sup>; between a landlord and his lessee, if the landlord's title may be prejudiced<sup>9</sup>; between persons under a common liability to pay tithes<sup>10</sup>; between persons concerned with a way, churchyard or common by the same title<sup>11</sup>; between a trade union and its members in respect of actions against employers for wages<sup>12</sup> or in respect of accidents<sup>13</sup>; between a trade union and its employees in respect of libels upon the employees<sup>14</sup>; and between persons acting in legitimate defence of commercial interests<sup>15</sup>. It seems that in order to qualify as a justification or excuse the commercial interest must arise independently of the alleged champertous agreement<sup>16</sup>. Commercial interests may be limited and where the likely benefit from an action far outweighs the commercial interest involved the principle provides no defence to a champertous action<sup>17</sup>.

Sufficient community of interest has been denied in the following cases<sup>18</sup>: between a director of a company and an expert employed by the company to report on appliances sold by the company in respect of a libel against the expert<sup>19</sup>; between a trade union and a member in respect of a libel on the member<sup>20</sup>; and between a sporting association and its officials in respect of alleged libels by the officials<sup>21</sup>.

If there is a sufficient community of interest between the parties an agreement will be valid even though it would otherwise be champertous as, for example, an agreement to divide the proceeds of a claim otherwise than in accordance with strict legal rights<sup>22</sup>.

1 *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 387, [1954] 3 All ER 339 at 350 per Danckwerts J; affd [1955] Ch 363 at 389, [1955] 1 All ER 481, CA.

2 *Findon v Parker* (1843) 11 M & W 675; *Hunter v Daniel* (1845) 4 Hare 420; *Alabaster v Harness* [1895] 1 QB 339, CA.

3 *Oram v Hutt* [1914] 1 Ch 98 at 104, CA, per Lord Parker (trade union maintaining one of its officers in an action for slander); cf *Hickman v Kent or Romney Marsh Sheepbreeders' Association* (1920) 36 TLR 528; affd 37 TLR 163, CA.

4 *Alabaster v Harness* [1895] 1 QB 339, CA. See also *Hutley v Hutley* (1873) LR 8 QB 112 ('collateral interest').

5 *Compania Colombiana de Seguros v Pacific Steam Navigation* [1965] 1 QB 101, [1964] 1 All ER 216. Thus in credit hire cases where the plaintiff is supported by legal expenses insurance, there will be no question of maintenance arising: see para 851 note 4 ante.

6 Cf para 851 note 3 ante.

7 *Martell v Consett Iron Co Ltd* [1955] Ch 363, [1955] 1 All ER 481, CA.

8 1 Hawk PC (8th Edn) 456, 457; 2 Roll Abr 115g; *Alabaster v Harness* [1894] 2 QB 897 at 901, obiter per Hawkins J; affd [1895] 1 QB 339, CA. In respect of property, an equitable interest, or a mere contingency of an interest, is sufficient to justify maintenance: *Alabaster v Harness* supra.

9 See the authorities cited in note 8 supra.

10 *Findon v Parker* (1843) 11 M & W 675. Tithes were in general commuted into tithe rentcharges by the Tithe Act 1836 and subsequent Acts. Tithe rentcharges were generally extinguished by the Tithe Act 1936. See ECCLESIASTICAL LAW; RENTCHARGES AND ANNUITIES.

11 *Alabaster v Harness* [1894] 2 QB 897 at 901, obiter per Hawkins J; affd [1895] 1 QB 339, CA.

12 *Greig v National Amalgamated Union of Shop Assistants* (1906) 22 TLR 274.

13 *Allen v Francis* [1914] 3 KB 1065 at 1067, CA, obiter per Lord Cozens-Hardy MR. In fact, this case did not concern maintenance, but it is relevant to note that 'there is no record in a long history of litigation of an employer having ever taken the point that all such trade union activity was unlawful': *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 427, [1955] 1 All ER 481 at 505, CA, per Hodson LJ.

14 *Hill v Archbold* [1968] 1 QB 686, [1967] 3 All ER 110, CA.

15 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, CA; and see *Plating Co v Farquharson* (1881) 17 ChD 49, CA; cf *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL.

16 *Giles v Thompson* [1993] 3 All ER 321 at 333, CA, per Steyn LJ; affd [1994] 1 AC 142, [1993] 3 All ER 321, HL.

17 *Advanced Technology Structures Ltd v Cray Valley Products Ltd* [1993] BCLC 723, CA.

18 Cf para 851 note 3 ante.

19 *Alabaster v Harness* [1895] 1 QB 339, CA.

20 *Greig v National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (1906) 22 TLR 274. See also *Oram v Hutt* [1914] 1 Ch 98, CA; accepted as law but distinguished in terms of subject matter in *Martell v Consett Iron Co Ltd* [1955] Ch 363, [1955] 1 All ER 481, CA, but doubted in *Hill v Archbold* [1968] 1 QB 686, [1967] 3 All ER 110, CA. It has been suggested that *Oram v Hutt* supra may be distinguished on the narrow ground that the person defamed was not an employee of the union: *Hill v Archbold* supra at 694 and 112 per Lord Denning MR. It seems that it has never been maintenance for an employer to support his employee in an action arising out of the employment: *Elborough v Ayres* (1870) LR 10 Eq 367.

21 *Baker v Jones* [1954] 2 All ER 553, [1954] 1 WLR 1005; doubted in *Hill v Archbold* [1968] 1 QB 686, [1967] 3 All ER 110, CA (see the text to note 14 supra).

22 *Guy v Churchill* (1888) 40 ChD 481; *Performing Rights Society Ltd v Thompson* (1918) 34 TLR 351.

## UPDATE

### 853 Justification: common interest

NOTE 15--See also *London and Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 (TCC), (2009) 121 ConLR 26.

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#### 854. Other justifications.

The extension of the notion of community of interest<sup>1</sup> in recent years will validate many agreements which in former times would have been obnoxious as involving maintenance; but there are certain other well-established instances of justification, which are sometimes regarded as falling under the head of charity, whereby there will be no maintenance if a person assists the suit of his near kinsman, poor neighbour or poor co-religionist<sup>2</sup>. Where a person thus assists a poor stranger, his action is justified if he has a bona fide belief in the justice of the cause, and it is not necessary that he should have made full inquiry into the matter, so as to have reasonable grounds for such belief<sup>3</sup>. Where there is no question of poverty, it is doubtful how far the exemption in respect of kinship can be extended. It was said to be confined to a father, a son, an heir apparent, or the husband of an heiress<sup>4</sup>; but more recently brothers, son-in-law and brothers-in-law were apparently regarded as within the exception<sup>5</sup>, though it has been said that it does not include cousins<sup>6</sup>. On the other hand, if an agreement involves champerty<sup>7</sup>, it will not be rendered valid by an intention to assist a poor person<sup>8</sup> nor by kinship<sup>9</sup>.

The majority of civil actions brought in the courts today are, however, supported by some association or other, or by the state itself, and few litigants bring suits or defend them at their own expense<sup>10</sup>. The main sources of, and justifications for, this 'maintenance' are as follows: (1) the Legal Aid scheme, which draws its justification from its statutory basis<sup>11</sup>; (2) groups providing legal advice and assistance in poor areas; these seem to rest on the justification of charity<sup>12</sup>; (3) trade unions pursuing claims on behalf of their members; these seem to be justified by community of interest<sup>13</sup>; (4) insurers defending actions brought against their policy-holders<sup>14</sup>; though this practice does not fall clearly within any of the previously considered heads of justification, it clearly does not offend against public policy, provided the agreement is made in the course of legitimate and genuine business<sup>15</sup>.

1 See para 853 ante.

2 4 Bl Com (1769) 134; 1 Hawk PC (8th Edn) 460; Vin Abr and Bac Abr 'Maintenance'; *Rothewel v Pewer* (1431) YB 9 Hen 6, p 64, pl 713; *Pomer (or Pomeroy) v Abbot of Buckfast* (1442) YB 21 Hen 6, p 15, pl 30; *Harris v Brisco* (1886) 17 QBD 504, CA; *Findon v Parker* (1843) 11 M & W 675. Charity induced by religious sympathy is none the less charity: *Holden v Thompson* [1907] 2 KB 489. As to employer and employee see para 853 note 13 ante. As to the position of a solicitor undertaking work without payment or taking up a case for a poor client outside the Legal Aid scheme see *Jennings v Johnson* (1873) LR 8 CP 425; *Clare v Joseph* [1907] 2 KB 369, CA; *Ladd v London Road Car Co* (1900) 110 LT Jo 80; *Rich v Cook* (1900) 110 LT Jo 94, CA; *Wiggins v Lavy* (1928) 44 TLR 721, CA. See also the Solicitors Act 1974 s 59 (as amended); and LEGAL PROFESSIONS vol 66 (2009) PARA 945. As to conditional fee agreements see para 852 ante.

3 *Harris v Brisco* (1886) 17 QBD 504, CA.

4 1 Hawk PC (8th Edn) 458. See, however, 2 Roll Abr 115h, 'A man may maintain his blood'.

5 *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 11, obiter per Lord Coleridge CJ.

6 *Burke v Greene* (1814) 2 Ball & B 517.

7 As to champerty as a species of maintenance see para 850 ante.

8 *Cole v Booker* (1913) 29 TLR 295.

9 *Hutley v Hutley* (1873) LR 8 QB 112.

10 See *Hill v Archbold* [1968] 1 QB 686 at 695, [1967] 3 All ER 110 at 112, CA, per Lord Denning MR.

11 See the Legal Aid Act 1974 (repealed); and LEGAL AID vol 65 (2008) PARA 2. See, however, para 852 note 8 ante.

12 See notes 1-9 supra.

13 See para 853 notes 12-13 ante.

14 Note also the practice of the insurer in asserting claims in the name of the insured, either under the terms of the policy or by the doctrine of subrogation: see para 853 ante; and INSURANCE.

15 *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 416, [1955] 1 All ER 481 at 498, 499, CA, obiter per Jenkins LJ. Similarly, a bank which lends money at interest to a customer to finance his litigation is not committing maintenance: *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 224, [1962] 3 All ER 351 at 358, CA, obiter per Donovan LJ. See further para 855 post.

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### **855. Effect of agreements involving maintenance.**

The fact that there is an agreement involving maintenance or champerty relating to an action provides no defence to that action<sup>1</sup>, but where the plaintiff in the action is one who does not have an original title to the claim, the fact that the assignment of the claim to him constituted maintenance or champerty may be pleaded as a defence to the action<sup>2</sup>.

As between the parties to it, an agreement involving champerty is certainly unenforceable<sup>3</sup>; and the same probably applies to an agreement involving maintenance without the element of champerty<sup>4</sup>, since champerty is only a variety of maintenance<sup>5</sup>. Where, however, a sum of money is lent in order to finance a suit upon terms that if the borrower wins he will repay more than the borrowed sum, the borrowed sum is recoverable notwithstanding the element of champerty in the agreement<sup>6</sup>.

The effect of maintenance or champerty may extend beyond the actual agreement; thus a claim by a solicitor on an indemnity policy in respect of a loss due to his having contracted a champertous agreement cannot be pursued in the courts<sup>7</sup>. However, a solicitor who is retained to conduct litigation in the ordinary way and on the usual terms, is not debarred from acting or recovering his costs simply because he knows that his client has made a champertous agreement with another to share the proceeds with that other; but if, as a party to the agreement or otherwise, he actively participates in the carrying out of the champertous agreement, he will lose his right to his costs<sup>8</sup>.

The court may order the losing party's costs to be paid by a person who has maintained an action. For this purpose the court may require that his identity be revealed<sup>9</sup>.

1 Nor did it even when maintenance and champerty were crimes: *Skelton v Baxter* [1916] 1 KB 321, CA; *Martell v Consett Iron Co Ltd* [1955] Ch 363, [1955] 1 All ER 481, CA. *McAll v Brooks* [1984] RTR 99, CA decides that the fact that there is an underlying illegal agreement will not prevent a plaintiff recovering from a third party tortfeasor. It is unnecessary for the plaintiff to plead the agreement which therefore takes effect as a simple action in negligence. There is a clear principle of law that a third party tortfeasor cannot plead an illegal contract as a defence to a negligence action: *Giles v Thompson* [1994] 1 AC 142, [1993] 3 All ER 321, HL. As to agreements involving maintenance or champerty see para 850 ante.

2 *Laurent v Sale & Co* [1963] 2 All ER 63, [1963] 1 WLR 829. As to assignment of rights of action see CH05ES IN ACTION vol 13 (2009) PARAS 98-99.

As regards third parties, a champertous agreement may have the further effect that a solicitor acting for a plaintiff under such an agreement may be personally liable for the costs of the defendants: *Danzey v Metropolitan Bank of England and Wales* (1912) 28 TLR 327; see also *Grassmoor Colliery Co v Workmen's Legal and Friendly Society and Connell* (1912) 1 LJNCCR 92.

3 *Hutley v Hutley* (1873) LR 8 QB 112; *Stanley v Jones* (1831) 7 Bing 369; *Strange v Brennan* (1846) 2 Coop temp Cott 1, CA; *Sprye v Porter* (1856) 7 E & B 58; *Earle v Hopwood* (1861) 9 CBNS 566; *Rees v De Bernardy* [1896] 2 Ch 437; *Cole v Booker* (1913) 29 TLR 295; and see *Wild v Simpson* [1919] 2 KB 544, CA (variation of terms of a solicitor's retainer so as to introduce champertous terms prevented solicitor from recovering on retainer).

4 Contra *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 4, obiter per Lord Coleridge CJ.

5 See para 850 note 4 ante.

6 *Cole v Booker* (1913) 29 TLR 295; and see *James v Kerr* (1889) 40 ChD 449.

7 *Haseldine v Hosken* [1933] 1 KB 822, CA; applied *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35.

8 *Re Trepca Mines Ltd (No 2)* [1963] Ch 199, [1962] 3 All ER 351, CA.

9 See the Supreme Court Act 1981 s 51, as interpreted in *Singh v Observer Ltd* [1989] 2 All ER 751, CA. See also *McFarlane v EE Caledonia Ltd (No 2)* [1995] 1 WLR 366, [1995] 1 Lloyd's Rep 535.

## **UPDATE**

### **855 Effect of agreements involving maintenance**

NOTES--The fact that a funding agreement might be contrary to public policy and therefore unenforceable between the parties is not a sufficient reason to regard the proceedings to which it relates as an abuse of process: *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116, CA.

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 856. Ouster of jurisdiction of the courts.

An agreement which ousts the jurisdiction of the courts is contrary to public policy<sup>1</sup>. Agreements infringing this rule, though void, are not illegal<sup>2</sup>.

It is sometimes quite difficult to distinguish an ouster clause from a clause designed to give rise to no legal relations<sup>3</sup>. An ouster clause is to be distinguished from a choice of jurisdiction clause. Such a clause may submit disputes to a foreign court and have the ancillary effect of depriving the English court of jurisdiction. Provided the clause is appropriate to the contract, under the application of the rules of conflict of laws<sup>4</sup>, it may be held valid. However, where the clause is a sham, the court may well decide it is a mere ouster clause<sup>5</sup>. European Union Directives on consumer matters often contain a paragraph declaring void attempts to choose non-European Union law or jurisdiction in an attempt to avoid statutory regulation<sup>6</sup>.

There is nothing, however, to prevent the parties to a contract from agreeing that no right of action is to accrue until a third person has decided on any differences that may arise between them, and this may be made to apply not only to the question of the amount that is due, but also to the question whether any liability has been incurred<sup>7</sup>. This is the basis of all arbitration agreements and other forms of alternative dispute resolution<sup>8</sup>.

A standard clause in a reinsurance contract that an arbitrator 'shall not be bound by the strict rules of law, but shall settle any differences referred to him according to an equitable rather than a strictly legal interpretation of the provisions of this agreement' is not to be construed as an ouster clause<sup>9</sup>.

1 See generally *Hyman v Hyman* [1929] AC 601, HL; and COURTS. See also *Re Wynn, Public Trustee v Newborough* [1952] Ch 271, [1952] 1 All ER 341; and WILLS vol 50 (2005 Reissue) para 478. As to a particular variety of agreements to oust the jurisdiction of the court see para 857 post.

2 There is no decision which is precisely in point on the statement in the text, but in *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, CA, the court applied the doctrine of severance to an arbitration clause infringing the rule as to ouster. It is possible that there can be no severance where the clause in the contract is illegal as opposed to merely void (see para 867 post). The agreements considered in para 857 post rest upon a similar principle and they are clearly void, not illegal.

3 As to agreements which are not intended to give rise to legal relations see para 718 et seq ante. See also *Baker v Jones* [1954] 2 All ER 553, [1954] 1 WLR 1004.

4 See the Civil Jurisdiction and Judgments Act 1982; and CONFLICT OF LAWS.

5 Such a rule is sometimes to be found in statute, eg the Unfair Contract Terms Act 1977 s 27(2) (see para 835 ante).

6 See eg EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) art 6(2); the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 7; and para 791 ante.

7 In *Harbour Assurance (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] QB 701, [1993] 3 All ER 897, CA, it was held that a widely drafted arbitration clause could allow an arbitrator jurisdiction to decide on issues of illegality in the contract and therefore on the validity of the contract as a whole.

8 See *Scott v Avery* (1856) 5 HL Cas 811; and ARBITRATION vol 2 (2008) PARA 1213 et seq. The standard phrase that an arbitrator's award shall be 'final and binding' does not oust the court's jurisdiction: see ARBITRATION vol 2 (2008) PARA 1208 et seq. In *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, [1992] 1 WLR 277, CA,



it was decided that appointing an expert (stated not to be an arbitrator) to resolve a dispute which was to be 'conclusive and final and binding for all purposes' was a valid clause and the outcome could not be disputed in the court unless it was clear on the face that the expert had acted fraudulently or otherwise improperly, mistake being an inadequate reason to intervene; and see *Campbell v Edwards* [1976] 1 All ER 785 at 788, [1976] 1 WLR 403 at 407-408, CA, per Lord Denning MR.

9 *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357; overruling *Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekering* [1962] 2 Lloyd's Rep 257, on the basis that the clause only affects 'technicalities and strict constructions' and that the arbitrator is otherwise obliged to apply the law. See also *West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd (The Glacier Bay)* [1996] 1 Lloyd's Rep 370, CA, where it was held that a clause in an insurance scheme which made the defendants 'sole judge of the validity ... of any claim made hereunder' was not an ouster clause, but only gave the party a right to determine facts and was subject to the jurisdiction of the court on matters of law.

## UPDATE

### 856 Ouster of jurisdiction of the courts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--See also *Aribisala v St James Homes (Grosvenor Dock) Ltd* [2007] 25 EG 183 (CS).

NOTE 6--SI 1994/3159 reg 7 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 9.

NOTE 8--See *Jagger v Decca Music Group Ltd* [2004] EWHC 2542 (Ch), [2005] FSR 582.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(2) CONTRACTS ILLEGAL OR VOID AT COMMON LAW/(ii) Contracts Wholly or Partially Invalidated by Public Policy/D. ADMINISTRATION OF JUSTICE/857. Void provisions in agreements for matrimonial maintenance.

### **857. Void provisions in agreements for matrimonial maintenance.**

At common law, a promise by a wife<sup>1</sup> in a separation agreement or agreement relating to divorce not to take proceedings against her husband in the future for financial provision is against public policy and is not enforceable against her<sup>2</sup>. The reason for this, at least in the context of subsequent divorce proceedings, is that the power of the court to make provision for the wife is a necessary incident of the power to dissolve the marriage, conferred not merely in the interests of the wife, but of the public<sup>3</sup>. Furthermore, by statute, if certain maintenance agreements<sup>4</sup> include provisions purporting to restrict any right to apply to a court for an order containing financial arrangements, then those provisions are void<sup>5</sup>.

Where an agreement between husband and wife contains such a void promise as above, the effect of it upon the rest of the agreement depends upon the other terms of the agreement or the effect of statutory provisions or both. At common law, a void promise not to apply to the court is not per se of such a character as to render the whole agreement necessarily unenforceable<sup>6</sup>; but, if that promise is substantially the whole consideration<sup>7</sup> for the promise to pay maintenance, the whole agreement fails for want of consideration<sup>8</sup>. Where, however, there is some other consideration for the promise to pay maintenance (for example a spouse's agreement to forgo her right to the other's consortium<sup>9</sup>) and that consideration can be severed<sup>10</sup> from the covenant not to apply to the court, the promise to pay maintenance can be enforced<sup>11</sup>.

In the case of maintenance agreements covered by the statutory provisions referred to above<sup>12</sup>, it is now provided that notwithstanding that a term restricting the right to apply for financial provision is void<sup>13</sup>, any other financial arrangements<sup>14</sup> contained in the agreement are not thereby rendered void or unenforceable and are, unless void or unenforceable for any other reason, binding on the parties to the agreement<sup>15</sup>. This provision is open to two possible interpretations: (1) that with reference to the agreements covered by it, the provision merely restates the common law, so that if the void promise is substantially the whole consideration for the promise to pay maintenance the latter remains unenforceable<sup>16</sup>; or (2) that the promise to pay maintenance is enforceable notwithstanding the lack of consideration caused by the voidness of the other promise<sup>17</sup>. The latter seems the better view<sup>18</sup>.

1 Perhaps such a promise by a husband would be equally unenforceable against him, since by statute the mutual rights to support of spouses (at least after dissolution of marriage) are now largely assimilated: see the Matrimonial Causes Act 1973 ss 23, 24. However, an agreement by the husband not to apply for a reduction of his maintenance liability is binding upon him: *Russell v Russell* [1956] P 283, [1956] 1 All ER 466. As to separation and maintenance agreements see *Hyman v Hyman* [1929] AC 601, HL; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 423 et seq; MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 696 et seq.

2 This will be so no matter what the nature of the subsequent proceedings in which the issue arises. It was held to apply to divorce proceedings in *Hyman v Hyman* [1929] AC 601, HL, and the reasoning is equally applicable to a suit for nullity. *Gandy v Gandy* (1882) 7 PD 168, CA, seems to suggest that the principle does not apply to suits for judicial separation, but note that: (1) the powers of the court in relation to financial matters on a decree of judicial separation are now for practical purposes indistinguishable from those on divorce, which was not the case in 1882; and (2) grave doubt was cast upon *Gandy v Gandy* supra in *Hyman v Hyman* supra.

3 *Hyman v Hyman* [1929] AC 601 at 614, HL, per Viscount Hailsham LC.

4 For this purpose a maintenance agreement means any agreement in writing made between the parties to a marriage, being (1) an agreement containing financial arrangements whether made during the continuance or after the dissolution or annulment of the marriage; or (2) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements: Matrimonial Causes Act 1973 s 34(2).

5 Ibid s 34(1).

6 *Bennett v Bennett* [1952] 1 KB 249 at 259, [1952] 1 All ER 413 at 420, CA, per Somervell LJ and at 260 and at 421 per Denning LJ. If, instead of seeking to oust the jurisdiction of the divorce court, the parties preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it will be valid: *Bennett v Bennett* [1952] 1 KB 249 at 262, [1952] 1 All ER 413 at 422, CA, obiter per Denning LJ.

7 As to consideration see para 727 et seq ante.

8 *Bennett v Bennett* [1952] 1 KB 249, [1952] 1 All ER 413, CA. This is so even though the covenant is in a deed (as in *Bennett v Bennett* supra) and a deed does not require to be supported by consideration (see para 727 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 59. This may seem to suggest a general rule to the effect that, where a contract taking the form of a deed is in fact made for valuable consideration, the promise of one party may be unenforceable if the consideration moving from the other fails. Another view, however, is that a result like that in *Bennett v Bennett* supra only follows where the promise of one side offends public policy and that in other cases want of mutuality is no defence to an action on a deed even where the deed was intended to be made for consideration: *Waite v Jennings* [1906] 2 KB 11 at 17, CA, obiter per Stirling LJ; *Bennett v Bennett* [1951] 2 KB 572 at 574, [1951] 1 All ER 1088 at 1091 obiter per Devlin J; *Comber v Fleet Electrics Ltd* [1955] 2 All ER 161 at 165, [1955] 1 WLR 566 at 572, obiter per Vaisey J.

9 *Bennett v Bennett* [1952] 1 KB 249 at 261, [1952] 1 All ER 413 at 421, CA, obiter per Denning LJ. See also *Goodinson v Goodinson* [1954] 2 QB 118, [1954] 2 All ER 255, CA (covenant by wife to indemnify husband against all debts incurred by her and not to pledge his credit); *Williams v Williams* [1957] 1 All ER 305, [1957] 1 WLR 148, CA (similar case).

10 As to severance see para 877 post.

11 See the cases cited in note 9 supra. See also *Hyman v Hyman* [1929] AC 601, HL.

12 See note 4 supra.

13 See note 5 supra.

14 'Financial arrangements' means provisions governing the rights and liabilities towards one another when living separately of the parties to a marriage (including a marriage which has been dissolved or annulled), in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family: Matrimonial Causes Act 1973 s 34(2).

15 Ibid s 34(1)(b).

16 The argument in support of this is that in a case like *Bennett v Bennett* [1952] 1 KB 249, [1952] 1 All ER 413, CA, the covenant to pay maintenance is not rendered unenforceable because the wife's covenant is void but because, her covenant being void, there is no consideration for the husband's promise and that this is '[an]other reason' under the Matrimonial Causes Act 1973 s 34(1)(b). Cf, however, the cases cited in the later part of note 8 supra.

17 In support of this view it may be argued that: (1) it is the only view which gives the statutory provisions any real effect; (2) the invalidity of the wife's covenant and the lack of consideration (see note 16 supra) are one and the same thing; (3) the 'other reasons' referred to in *ibid* s 34(1)(b) are 'extrinsic' matters such as fraud or mistake.

18 Two other relevant considerations arise in relation to simple contracts in this area: (1) in other contexts consideration has sometimes been found notwithstanding that the promise of one party is not binding upon him (*Holt v Ward Clarendieux* (1732) 2 Stra 937 (minority); *Molton v Camroux* (1849) 4 Exch 17, Ex Ch (mental disorder)); (2) where one party's promise is not binding upon him, consideration has sometimes been found if he actually performs the promise (see eg *Fishmongers' Co v Robertson* (1843) 5 Man & G 131 (performance by corporation of contract not made under its seal)).

## UPDATE

### 857 Void provisions in agreements for matrimonial maintenance

NOTE 1--1973 Act s 24 amended: Welfare Reform and Pensions Act 1999 Sch 3 paras 1, 3.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(2) CONTRACTS ILLEGAL OR VOID AT COMMON LAW/(ii) Contracts Wholly or Partially Invalidated by Public Policy/D. ADMINISTRATION OF JUSTICE/858. Miscellaneous agreements interfering with the course of justice.

### **858. Miscellaneous agreements interfering with the course of justice.**

Apart from the instances discussed in the preceding paragraphs of contracts being illegal<sup>1</sup> or void<sup>2</sup> as affecting the course of justice, there is a general principle that any contract which has a tendency to affect the due administration of justice is contrary to public policy<sup>3</sup>. Thus the following contracts have been held illegal under this principle: an agreement for the withdrawal of an election petition in which charges of bribery were made<sup>4</sup>; a bad faith agreement to compromise a claim<sup>5</sup>; an agreement not to give evidence before a parliamentary committee<sup>6</sup>; an agreement of a preferential character between a debtor and creditor<sup>7</sup>; an agreement not to oppose a bankrupt's application for discharge<sup>8</sup>; a secret agreement by a shareholder in a company which was being wound up to prevent or interfere with the disposal of the company's assets in the manner provided by law<sup>9</sup>; an agreement to stay proceedings to strike a solicitor off the rolls<sup>10</sup>; an agreement to use influence to obtain a pardon<sup>11</sup>; and an agreement to conceal material facts from the divorce court<sup>12</sup>.

An agreement by the directors of a company to give undertakings to support a planning application for a period of seven years, although a fetter on their discretion, was held not to offend public policy<sup>13</sup>.

1 See paras 848-855 ante.

2 See paras 856-857 ante. As to the distinction between illegal and void contracts see para 836 ante.

3 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 163, obiter per Lord Lyndhurst; *Lound v Grimwade* (1888) 39 ChD 605.

4 *Coppock v Bower* (1838) 4 M & W 361.

5 See para 740 ante.

6 *Crampton v Green* (1848) 10 LTOS 442.

7 *Mallalieu v Hodgson* (1851) 16 QB 689; see further para 839 ante.

8 *Hall v Dyson* (1852) 17 QB 785; *Hills v Mitson* (1853) 8 Exch 751; *Kearley v Thomson* (1890) 24 QBD 742, CA.

9 *Elliott v Richardson* (1870) LR 5 CP 744.

10 *Kirwan v Goodman* (1841) 9 Dowl 330.

11 *Norman v Cole* (1800) 3 Esp 253; cf *Lampleigh v Braithwait* (1615) Hob 105.

12 *Prevost v Wood* (1905) 21 TLR 684. The bar of collusion in divorce suits has been abolished; but an agreement to conceal material facts would still be illegal: see the Matrimonial Causes Act 1973 s 9(1); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 877.

13 *Fulham Football Club Ltd v Cabra Estates plc* [1994] 1 BCLC 363, CA.

## **UPDATE**

### **858 Miscellaneous agreements interfering with the course of justice**

NOTE 3--An agreement to pay for a police informer's information is contrary to police policy: *Carnduff v Rock* [2001] All ER (D) 151 (May), CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(2) CONTRACTS ILLEGAL OR VOID AT COMMON LAW/(ii) Contracts Wholly or Partially Invalidated by Public Policy/E. IMMORAL CONTRACTS/859. Sexual immorality.

## **E. IMMORAL CONTRACTS**

### **859. Sexual immorality.**

This is an area which has to be approached with much caution. Sexual mores have changed a great deal in recent years and it is difficult to know how far a modern court would follow early authority.

The classic rule is that a contract which is made upon a sexually<sup>1</sup> immoral consideration or for a sexually immoral purpose is against public policy and is illegal and unenforceable<sup>2</sup>. Though such a contract does not necessarily, nor even usually, involve criminality<sup>3</sup>, it is no different in civil consequences from a contract to commit a crime<sup>4</sup>. Thus no action lies for recovery of rent of premises knowingly<sup>5</sup> let for the purposes of prostitution<sup>6</sup> and other covenants in such an agreement are also unenforceable<sup>7</sup>. Similarly, no action lies to recover the price of goods supplied to a prostitute with knowledge that she intends to use them for her trade<sup>8</sup>, whether or not it is intended that payment shall come from the proceeds of the immoral purpose<sup>9</sup>. On the other hand, even a prostitute must have the necessities of life<sup>10</sup> so that a contract to let premises to a prostitute who carries on her trade elsewhere is valid<sup>11</sup>.

The courts have recently been prepared to grant the equitable remedy of rescission on a partly illegal contract<sup>12</sup> whereas in former times the court would have been likely to refuse to take cognisance of the contract at all. This perhaps shows the changing face of morality. Where a contract of employment is regular on its face and contains nothing about immoral acts, but the job actually requires the employee to procure prostitutes for clients, the employee is not thereby debarred from bringing a claim for unfair dismissal<sup>13</sup>.

1 This head of public policy has never been extended beyond this sector of morality.

2 See the cases cited in notes 4-9 infra; and para 860 post.

3 Thus the typical contract infringing this head of public policy is an agreement for future illicit cohabitation (see para 860 post) and such an agreement involves no criminality. Homosexual activity is in many cases no longer criminal (see the Sexual Offences Act 1967; and CRIMINAL LAW, EVIDENCE AND PROCEDURE); it is submitted that any contract to further, or in consideration of, homosexual relations may still be against public policy and an illegal contract; *sed quaere*.

4 *Pearce v Brooks* (1866) LR 1 Exch 213. As to the effect of contracts vitiated by illegality or public policy see para 869 et seq post.

5 Where the landlord discovers the immoral purpose after the commencement of the lease he may not recover rent for the period after his discovery: *Jennings v Throgmorton* (1825) Ry & M 251. In that case, the landlord did nothing to evict the tenant after his discovery. Presumably, if he immediately takes steps to evict the tenant he may recover rent during the time expended in the possession proceedings. As to the power of a landlord or lessor to determine the tenancy of premises on conviction of the tenant for permitting them to be used as a brothel see the Sexual Offences Act 1956 s 35; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 22. As to the effect of ignorance of the illegality see further para 874 post. Cf *Streatham Cinema Ltd v John McLauchlan Ltd* [1933] 2 KB 331 (premises let for business which might be carried on legally; landlord entitled to assume that it would be so carried on).

6 *Girardy v Richardson* (1793) 1 Esp 13; *Appleton v Campbell* (1826) 2 C & P 347. This principle has been taken so far as to deny recovery of rent to a landlord who knew (by his agent) that his tenant was the mistress of a certain man and he assumed that that man, who visited her on the premises, would pay the rent: *Upfill v Wright* [1911] 1 KB 506.

7 *Smith v White*(1866) LR 1 Eq 626 (assignment of lease).

8 *Pearce v Brooks*(1866) LR 1 Exch 213 (hire of brougham); *Bowry v Bennet* (1808) 1 Camp 348 (sale of clothes); and see *Hamilton v Granger* (1859) 5 H & N 40 (sale of wine for use in brothel).

9 *Pearce v Brooks*(1866) LR 1 Exch 213.

10 *Appleton v Campbell* (1826) 2 C & P 347 at 348 per Abbott CJ.

11 *Appleton v Campbell* (1826) 2 C & P 347. This is so, presumably, even though the rent is paid entirely out of the proceeds of prostitution. See also *Lloyd v Johnson* (1798) 1 Bos & P 340 (contract to wash prostitute's clothing enforceable notwithstanding that the clothing included gentlemen's nightcaps).

12 See *Hughes v Clewley, The Siben (No 2)* [1996] 1 Lloyds Rep 35, where the parties entered a contract of exchange, part of the consideration being the transfer of a business operating to supply girls for money. The court subsequently allowed rescission of the contract on the grounds of misrepresentation, but refused to award damages in relation to the illegal business.

13 *Coral Leisure Group Ltd v Barnett* [1981] ICR 503, EAT.

## **UPDATE**

### **859 Sexual immorality**

NOTE 5--Sexual Offences Act 1956 s 35 amended: Statute Law (Repeals) Act 2008.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(2) CONTRACTS ILLEGAL OR VOID AT COMMON LAW/(ii) Contracts Wholly or Partially Invalidated by Public Policy/E. IMMORAL CONTRACTS/860. Agreements in respect of illicit cohabitation.

### **860. Agreements in respect of illicit cohabitation.**

The law in this area is very uncertain. Early cases establish clear principles that most contracts in this area are illegal<sup>1</sup>, although it is doubtful to what extent these principles still apply in the light of a very different modern society. A promise by a man to pay money to a woman<sup>2</sup> in consideration of illicit sexual intercourse which is to take place between them has been held to be illegal and unenforceable, even if made by deed<sup>3</sup>, and even if the relationship is not adulterous<sup>4</sup>. On the other hand, a promise which is made in consideration of past cohabitation only is simply a voluntary promise<sup>5</sup> which is unaffected by public policy and can be enforced<sup>6</sup>. Where the promise is made in consideration of past cohabitation, the fact of continuance of the cohabitation does not invalidate the promise<sup>7</sup>; nor is it fatal to the promise even though, at the time it was made, the parties contemplated a continuance of the cohabitation, so long as the promise was not made in order to secure the continued cohabitation<sup>8</sup>. Where a promise appears to be connected with illicit cohabitation, the onus of showing that it was made in consideration of future illicit cohabitation lies upon the person seeking to impeach the promise<sup>9</sup>; and the mere continuance of the cohabitation does not raise any presumption that the promise was made to secure that continuance<sup>10</sup>. However, cohabitation between unmarried couples is now commonplace and does not carry the former moral stigma. There is some statutory acceptance of this situation and in some respects the law has moved to equate married and unmarried couples<sup>11</sup> but there is no specific legislation to alter the common law in respect of contracts<sup>12</sup>.

The principle invalidating agreements in respect of future illicit cohabitation applies equally to a separation agreement between husband and wife<sup>13</sup>, so that if such an agreement is made with the purpose of licensing a renewal or continuance of illicit cohabitation with others by both parties, or by one of the parties to the knowledge of the other<sup>14</sup>, it is unenforceable<sup>15</sup>. Where such an agreement for separation is made and one party has the purpose, which he conceals from the other, of assisting his own illicit intercourse, the agreement is voidable and will be set aside at the instance of the innocent party<sup>16</sup>.

1 This is assuming that such arrangements are not to be regarded as domestic agreements and therefore with no intention to create legal relations: see *Layton v Martin* [1986] 2 FLR 227; and *Horrocks v Foray* [1976] 1 All ER 737, [1976] 1 WLR 230, CA.

2 And, presumably, vice versa. Such an agreement between homosexuals would also be caught. It probably applies to agreements for sexual services of any kind: see *Kelly v Purvis* [1983] QB 663, [1983] 1 All ER 525.

3 *Robinson v Gee* (1749) 1 Ves Sen 251; *Walker v Perkins* (1764) 1 Wm Bl 517; *Gray v Mathias* (1800) 5 Ves 286; *Benyon v Nettlefold* (1850) 3 Mac & G 94; *Ford v Davésiés de Pontès*, *Davésiés de Pontès v Kendall* (1861) 30 Beav 572; *Willyams v Bullmore* (1863) 33 LJ Ch 461; *Ayerst v Jenkins* (1873) LR 16 Eq 275; *Lazarenko v Borowsky* [1966] SCR 556, 57 DLR (2d) 577 (Can SC); and see *Phillips v Probyn* [1899] 1 Ch 811 (trust in favour of intended wife, who was in fact the sister of the settlor's deceased wife, held invalid. But see now the Marriage (Enabling) Act 1960 s 1). The invalidity also applies to contracts with third parties who bring about or allow illicit cohabitation: see *Willyams v Bullmore* supra. Again it is unclear how far these precedents apply in the modern day. In *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA, a man purchased a house and gave his mistress licence to live there with their twin daughters. The relationship ended and some time later the man sought a possession order. The court held that there was an implied licence that the woman was entitled to continue to occupy the house at least until the children left school. No mention was made of the potential illegality of the situation.

4 *Walker v Perkins* (1764) 1 Wm Bl 517. Where the relationship is adulterous, it is still likely that a contract would be held void today.

5 Ie a promise for which the consideration is past and therefore ineffective: see para 739 ante. If, of course, such a promise was supported by other consideration it would be binding in the absence of a deed. Cf *Matthews v L--e* (1816) 1 Madd 558 (parol agreement in respect of past cohabitation unenforceable); *Binnington v Wallis* (1821) 4 B & Ald 650; *Beaumont v Reeve* (1846) 8 QB 483; *Lancaster v Carter* (1854) 23 LTOS 109 (similar cases). As to what constitutes valuable consideration see para 727 et seq ante.

6 *Spicer v Hayward* (1700) Prec Ch 114; *Marchioness of Anandale v Harris* (1728) 1 Bro Parl Cas 250, HL; *Turner v Vaughan* (1767) 2 Wils 339; *Gibson v Dickie* (1815) 3 M & S 463; *Knye v Moore* (1822) 1 Sim & St 61; *Nye v Moseley* (1826) 6 B & C 133; *Friend v Harrison* (1827) 2 C & P 584; *Hall v Palmer* (1844) 3 Hare 532; *Re Henderson, Henderson v Bird* (1889) 5 TLR 374; *Re Coates, ex p Scott* (1892) 9 Morr 87. In the past such a promise was only enforceable if made by deed; but see now also the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 7-8, 32-34.

7 *Spurgeon and Public Trustee v Aasen* (1965) 52 WWR 641, 52 DLR (2d) 67 (BC).

8 *Re Wootton Isaacson, Sanders v Smiles* (1904) 21 TLR 89. See also on this subject *Re Wood, ex p Naden* (1874) 9 Ch App 670 (proviso for avoidance of deed on resumption of cohabitation held void); and *Re Abdy* [1895] 1 Ch 455, CA (such a proviso not implied). See also *Cooke v Head* [1972] 2 All ER 38, [1972] 1 WLR 518, CA; and *Stanley v Stanley* (1960) 30 WWR 686, 23 DLR (2d) 620 (Alta) (cases of mistresses making contributions to the acquisition of the 'matrimonial' home), though these cases depend on the law of trusts rather than the law of contract.

9 *Howell v Price* (1855) 25 LTOS 194.

10 *Re Vallance, Vallance v Blagden* (1884) 26 ChD 353.

11 See eg the Housing Act 1985 s 57 (as amended); the Fatal Accidents Act 1976 s 1(3)(b) (as substituted); the Family Law Act 1996 Pt IV (ss 35-40; but see s 41); and the Inheritance (Provision for Family and Dependents) Act 1975. Most of these do not extend to homosexual or lesbian relationships: see eg *Harrogate Borough Council v Simpson* [1986] 2 FLR 91, CA.

12 This is to be compared with Australia and Canada, where specific legislation on this point has been enacted.

13 As to such agreements see further para 864 post.

14 *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA.

15 Quaere, as to the limits of this principle in the present day. Unless 'purpose' were narrowly defined many, if not most, separation agreements would be struck down.

16 *Evans v Carrington* (1860) 2 De GF & J 481. In the absence of such circumstances or of a *dum casta* clause, a spouse's subsequent adultery provides no defence to an action on the agreement: see *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 438.

## UPDATE

### 860 Agreements in respect of illicit cohabitation

NOTE 2--See *Sutton v Mishcon de Reya (a firm)* [2003] EWHC 3166 (Ch), [2004] 3 FCR 142 (cohabitation deed in respect of property relationship which sprang from sexual relationship illegal and unenforceable).

NOTE 11--1976 Act s 1(3)(b) amended: Civil Partnership Act 2004 s 83(3). 1996 Act ss 36, 38 amended, s 41 repealed: Domestic Violence, Crime and Victims Act 2004 s 2, Sch 10 paras 34, 35, Sch 11.

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## ***F. CONTRACTS PREJUDICIAL TO FAMILY LIFE***

### **861. Introduction.**

Notwithstanding that there is no compulsion to marry and that divorce is allowed by statute, the common law looks favourably upon the institution of marriage and, on the grounds of public policy, will not enforce certain contracts<sup>1</sup> as being prejudicial to the status of marriage and family life. This is so even though these contracts involve no agreement to do an illegal act nor any encouragement to sexual immorality<sup>2</sup>.

<sup>1</sup> See paras 862-865 post.

<sup>2</sup> In one class of case under this head (ie promises of marriage by married persons), the unenforceability of the promise was sometimes justified by an alleged inducement to immorality. However, by the Law Reform (Miscellaneous Provisions) Act 1970 s 1(1), an agreement between two persons to marry one another does not under the law of England and Wales have effect as a contract giving rise to legal rights and no action lies in England and Wales for breach of such an agreement, whatever the law applicable to the agreement. See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 16.

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## 862. Restraint of marriage.

A contract which is in general restraint of marriage is usually unenforceable<sup>1</sup>, though at least where the contract is a promise of a gift by deed and the restraint is to be construed as a limitation rather than a condition such a restraint will be valid<sup>2</sup>. There are no English authorities<sup>3</sup> on the validity of partial restraints<sup>4</sup> in relation to such contracts, but the principles applicable to gifts would probably apply by analogy, so that such a partial restraint would generally be valid<sup>5</sup>. On the other hand, there is authority from other jurisdictions to the effect that the validity of a partial restraint is to be judged by the reasonableness of the restraint in all the circumstances<sup>6</sup>. Contracts in restraint of marriage, though unenforceable, are probably not to be described as illegal<sup>7</sup>.

1 *Anon* (1589) Owen 34 (promise by widow to pay £100 if she married again); *Baker v White* (1690) 2 Vern 215 (similar case). Note, however, that in the context of gifts, a condition in restraint of a second marriage, where there is no gift over or residual disposition, is considered partial only: see *Leong v Lim Beng Chye* [1955] AC 648, [1955] 2 All ER 903, PC; and WILLS vol 50 (2005 Reissue) paras 424-425; and *Newton v Marsden* (1862) 2 John & H 356; and GIFTS vol 52 (2009) PARA 255. As to the effect of partial restraints in gifts see note 5 infra; *Hartley v Rice* (1808) 10 East 22 (wagering contract not to marry again within stated period); *Re Johnson's Will Trusts*, *National Provincial Bank Ltd v Jeffrey* [1967] Ch 387, [1967] 1 All ER 553 (annuity to be increased on divorce or separation).

2 *Webb v Grace* (1848) 2 Ph 701 (covenant to pay single woman £40 per annum for life, to be reduced to £20 per annum in the event of her marriage). As to the distinction between a condition (to which the principles relating to restraint of marriage apply) and a limitation (to which they do not apply) see *Heath v Lewis* (1853) 3 De GM & G 954; and WILLS vol 50 (2005 Reissue) para 428. It has also been held in relation to gifts that even a total restraint constituting a condition may be valid if its purpose is not the promotion of celibacy but some other, lawful, object: see *Re Hewitt*, *Eldridge v Iles* [1918] 1 Ch 458; and GIFTS vol 52 (2009) PARA 255; WILLS vol 50 (2005 Reissue) paras 423, 428. Quaere, whether this principle is applicable to contracts.

3 Except the somewhat doubtful one of *Hartley v Rice* (1808) 10 East 22 (see note 1 supra).

4 Eg not to marry a named person or persons of a particular description or not to marry for a definite time.

5 See *Haughton v Haughton* (1824) 1 Mol 611 (and WILLS vol 50 (2005 Reissue) para 424); *Gillet v Wray* (1715) 1 P Wms 284 (and GIFTS vol 52 (2009) PARA 255).

6 *Crowder v Sullivan* (1905) 4 OWR 397 (Ont CA); *Minister for Education v Owell and Moreschini* [1966] WAR 39 (W Aust). See also *Price v Rhondda UDC* [1923] 2 Ch 372, where it was held that a resolution of a local authority to dismiss all married teachers was not against public policy as in restraint of marriage. Such a decision would now be an unlawful discrimination under the Sex Discrimination Act 1975 and give rise to an action for damages by those affected: see further DISCRIMINATION vol 13 (2007 Reissue) para 337 et seq.

7 As to the consequences of the distinction between illegal and void contracts see para 836 ante.

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### **863. Marriage brokage contracts.**

The classic principle is that marriage brokage contracts, that is to say, contracts for the payment of money in consideration of procuring a marriage, are against public policy<sup>1</sup>, whether the contract is to procure a marriage with a particular individual or with one out of a class of persons, or to procure a marriage generally with any person who may be considered suitable; the evil consists in the introduction of a money payment into that which should be free from any such taint<sup>2</sup>. However, there has been no case law since 1905 on the point and today there are many businesses which seek to effect introductions between individuals with a possible view to marriage. It would be astonishing if these were regarded as unlawful in the modern day or that contracts involving the taking of introduction or registration fees by such bodies were void. Clearly the circumstances are very different from those prevailing in the nineteenth century cases and it is very difficult to state the law with any degree of certainty. There may be more validity in the case law where the arrangement involves a more direct link to marriage<sup>3</sup>.

A contract under which a parent or guardian acquires a personal benefit which is given in order to induce him to consent to the marriage of his child or ward, or to withdraw his opposition, is void for similar reasons<sup>4</sup>.

1 *Arundel v Trevillian* (1635) 1 Rep Ch 87; *Hall v Potter* (1695) 3 Lev 411; *Scribblehill v Brett* (1703) 4 Bro Parl Cas 144; *Keat v Allen* (1707) 2 Vern 588; *Cole v Gibson* (1750) 1 Ves Sen 503; *King v Burr* (1810) 3 Mer 693.

2 *Hermann v Charlesworth* [1905] 2 KB 123, CA. As to recovery of money paid under such a contract see para 887 post.

3 Eg marriage brokers are still used in relation to the arranged marriages common in certain cultures, although there is often no fee involved.

4 *Duke of Hamilton v Lord Mohun* (1710) 1 P Wms 118 (agreement to release wife's guardian from his obligation to render accounts).

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#### 864. Future separation of husband and wife.

Where the parties to a marriage have determined to separate at once, an agreement between them as to the terms on which the separation is to take place is valid<sup>1</sup>. However, an agreement which provides for a separation to take place between husband and wife at some future time is void as contrary to public policy<sup>2</sup>. The following have been held to fall within the class of agreements providing for future separation: a covenant in a settlement before marriage to make provision for a spouse<sup>3</sup> (or a condition for the cesser of his interests<sup>4</sup>) in the event of separation; a clause in a separation deed providing that the payment of an annuity to the wife would, in the event of a reconciliation, be suspended during re-cohabitation, and resumed if the parties separated<sup>5</sup>. On the other hand, the law encourages reconciliation, so that an agreement which has as its object the termination of an existing separation does not offend public policy merely because it contemplates and makes provision for the possibility that the parties will again become separated<sup>6</sup>.

<sup>1</sup> *Jee v Thurlow* (1824) 2 B & C 547; *Wilson v Mushett* (1832) 3 B & Ad 743; *Jones v Waite* (1842) 9 Cl & Fin 101, HL; *Wilson v Wilson* (1848) 1 HL Cas 538; *Randle v Gould* (1857) 8 E & B 457; *Hunt v Hunt* (1862) 4 De G F & J 221; *Besant v Wood* (1879) 12 ChD 605. If there is an agreement for immediate separation, but the parties continue to live together, the agreement is of no effect: *Hindley v Marquis of Westmeath* (1827) 6 B & C 200; *Bindley v Mulloney* (1869) LR 7 Eq 343. As to separation agreements in general see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 423 et seq. The agreement is, however, subject to the control of the court, which has power to override the agreement: see the Matrimonial Causes Act 1973 ss 34-36 (s 35 as substituted). Provisions in the agreement restricting the right to apply to the court are void: see *Jessel v Jessel* [1979] 3 All ER 645 at 647, [1979] 1 WLR 1148 at 1152, CA.

<sup>2</sup> *Durant v Titley* (1819) 7 Price 577, Ex Ch; *Hindley v Marquis of Westmeath* (1827) 6 B & C 200; *Cocksedge v Cocksedge* (1844) 14 Sim 244; *Marquis of Westmeath v Marquis of Salisbury* (1831) 5 Bli NS 339, HL; *Wilson v Wilson* (1848) 1 HL Cas 538 at 573; *Vansittart v Vansittart* (1858) 4 K & J 62 per Turner LJ (affd 2 De G & J 249); *Cartwright v Cartwright* (1853) 3 De GM & G 982; *H v W* (1857) 3 K & J 382; *Proctor v Robinson* (1866) 35 Beav 329 (affd 1867) 15 LT 431; *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116, CA; *Re Morgan, Dowson v Davey* (1910) 26 TLR 398. See also *Brodie v Brodie* [1917] P 271 (agreement for non-cohabitation made before and confirmed after marriage held void). Cf *Nicol v Nicol* (1886) 31 ChD 524, CA (where an agreement was made during proceedings for judicial separation as to the use by the wife of certain furniture if judicial separation were decreed). See also *Davies v Elmslie* [1938] 1 KB 337, [1937] 4 All ER 471, CA.

It is difficult to know how far these cases still represent the law. Prenuptial contracts are now commonplace and it remains to be seen what the modern judicial attitude would be. At the date at which this volume states the law, the issue was undergoing some examination and there was the possibility that the law might be changed to make such contracts legally binding: see James Marcus, 'Prenuptial Agreements' [1997] Fam Law 669.

<sup>3</sup> See *Cocksedge v Cocksedge* (1844) 14 Sim 244 at 246, 247 per Shadwell V-C; *Cocksedge v Cocksedge* (1845) 5 Hare 397; *H v W* (1857) 3 K & J 382; *Duchess of Marlborough v Duke of Marlborough* [1901] 1 Ch 165 at 171, CA; but see contra *Hoare v Hoare* (1790) 2 Ridg Parl Rep 268.

<sup>4</sup> *Merryweather v Jones* (1864) 4 Giff 509. It is immaterial that the settlement is made by a third person: *Cartwright v Cartwright* (1853) 3 De GM & G 982; cf *Re Hope Johnstone*, *Hope Johnstone v Hope Johnstone* [1904] 1 Ch 470.

<sup>5</sup> *Earl of Westmeath v Countess of Westmeath* (1821) Jac 126 at 140; *Byrne v Lord Carew* (1849) 13 I Eq R 1; cf *Re Charleton*, *Bracey v Sherwin* (1911) 55 Sol Jo 330.

A provision in a separation deed for the continuance of the trusts of the deed notwithstanding any agreement by the parties to live together again is valid: *Wilson v Mushett* (1832) 3 B & Ad 743; *Webster v Webster* (1853) 4 De GM & G 437; *Byrne v Lord Carew* (1849) 13 I Eq R 1. For the effect of reconciliation upon a separation

agreement see generally *Marquis of Westmeath v Marchioness of Westmeath* (1830) 1 Dow & CI 519, HL; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 447.

6 *Vandergucht v De Blaquièr* (1839) 5 My & Cr 229; *Harrison v Harrison* [1910] 1 KB 35; *Purser v Purser* [1913] 1 IR 422 (affd [1913] 1 IR 428, CA); *MacMahon v MacMahon* [1913] 1 IR 154; *Re Meyrick's Settlement, Meyrick v Meyrick* [1921] 1 Ch 311; *Lurie v Lurie* [1938] 3 All ER 156; and see *Jodrell v Jodrell* (1845) 9 Beav 45.

## UPDATE

### 864 Future separation of husband and wife

NOTE 2--While the court cannot force compliance with an ante-nuptial agreement, when considering an application for a child contact order by consent where an earlier contact order was based on there being compliance with the agreement, the court may refuse to hear the application until the agreement has been honoured: *N v N (divorce: ante-nuptial agreement)* [1999] 2 FCR 583.

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### **865. Parent and child.**

Agreements between husband and wife which purport to restrict the right to apply to the court for financial provision for children are void at common law<sup>1</sup> and in many cases are also void by statute<sup>2</sup>. The principles applicable to such agreements and the effects of them are the same as those governing restrictions on the spouse's right to seek financial provision for himself or herself<sup>3</sup>.

A parent cannot by contract bind himself or herself to abandon the residence rights<sup>4</sup> or religious education<sup>5</sup> of his or her child. An agreement by a parent to forgo statutory rights of support in respect of a child is not a bar to taking proceedings to enforce such rights<sup>6</sup>. A person who has parental responsibility<sup>7</sup> for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his or her behalf<sup>8</sup>. Furthermore, in any proceedings relating to the upbringing of a child, or the administration of a child's property or the application of any income arising from it, the child's welfare is the court's paramount consideration<sup>9</sup>.

<sup>1</sup> *Northrop v Northrop* [1968] P 74 at 97, [1967] 2 All ER 961 at 965, CA, per Willmer LJ and at 116 and 978-979 per Diplock LJ.

<sup>2</sup> See the Matrimonial Causes Act 1973 s 34; the Child Support Act 1991 s 9 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) paras 549, 555.

<sup>3</sup> See para 857 ante.

<sup>4</sup> *Re Andrews* (1873) LR 8 QB 153. The law does provide by statute for adoption: see the Adoption Act 1976; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 323 et seq.

<sup>5</sup> See *Re Agar-Ellis, Agar-Ellis v Lascelles* (1878) 10 ChD 49, CA.

<sup>6</sup> See *Follit v Koetzow* (1860) 2 E & E 730.

<sup>7</sup> This includes a mother of an illegitimate child. For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 134.

<sup>8</sup> See *ibid* s 2(9); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 143.

<sup>9</sup> See *ibid* s 1(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 300.



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## **G. RESTRAINT OF TRADE**

### **866. In general.**

Contracts or covenants in contracts which are in unreasonable restraint of trade are unenforceable at common law as being contrary to public policy<sup>1</sup>. Similarly, certain restrictive trading agreements are invalidated by statute<sup>2</sup> and monopolies are subject to inquiry and restriction by statute<sup>3</sup>.

Contracts in restraint of trade at common law are not illegal, but merely void<sup>4</sup>.

1 See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*[1968] AC 269, [1967] 1 All ER 699, HL; and COMPETITION vol 18 (2009) PARA 377 et seq.

2 See generally the Restrictive Trade Practices Act 1976. Many such agreements are unlawful under European law and can lead to large fines being imposed by the European Commission.

3 See the Fair Trading Act 1973.

4 *Bennett v Bennett*[1952] 1 KB 249 at 262, [1952] 1 All ER 413 at 421, CA, obiter per Denning LJ; and see *Price v Green* (1847) 16 M & W 346 at 353, Ex Ch, per Patteson J; *Joseph Evans & Co v Heathcote*[1918] 1 KB 418, CA. As to the distinction between void and illegal contracts see para 836 ante.

## **UPDATE**

### **866 In general**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTE 3--Fair Trading Act 1973 monopoly inquiries regime replaced by Enterprise Act 2002 Pt 4 (ss 131-184) which makes provision for a system of market investigations: see COMPETITION vol 18 (2009) PARAS 276-318.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(3) CONTRACTS AFFECTED BY STATUTE/867. In general.

### **(3) CONTRACTS AFFECTED BY STATUTE**

#### **867. In general.**

Many contracts are affected by statutory provisions<sup>1</sup>, but the effect of such provisions varies from one statute to another<sup>2</sup>. For example, many professions, trades, and businesses are regulated by statute, and are subject to certain statutory restrictions as to the persons by whom or the manner in which they may be exercised or carried on<sup>3</sup>.

In some cases the statute may on its proper construction prohibit the creation or enforcement of rights under the contract<sup>4</sup>; in other cases the statute may not directly prohibit the contract, but may affect it indirectly by virtue of the principle that a contract with a criminal purpose (including criminality by statute) is illegal at common law<sup>5</sup>; and in some cases statute expressly makes a contract 'void'<sup>6</sup>.

Certain contracts not complying with statutory provisions are usually described as unenforceable and these are considered elsewhere in this title<sup>7</sup>.

1 For this purpose, 'statutory provisions' includes regulations etc made under statutory powers.

2 For the effect of non-compliance with a particular statute, reference should be made to that statute.

3 Eg solicitors are required to have their names enrolled (see the Solicitors Act 1974 ss 1, 6-8 (as amended); and LEGAL PROFESSIONS vol 65 (2008) PARA 661 et seq) and to hold practising certificates (see ss 1, 9-18 (as amended); and LEGAL PROFESSIONS vol 65 (2008) PARA 667 et seq). As to the statutory regulation of trade in general see COMPETITION; TRADE AND INDUSTRY.

4 For example, the sale of any public office is prohibited by statute: see the Sale of Offices Act 1551; the Sale of Offices Act 1809; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 535. Such contracts are also illegal at common law: see para 845 ante. As to illegal contracts see further para 869 et seq post. Such contracts are not necessarily rendered unenforceable; this depends upon the terms of the particular statute.

5 See para 874 post.

6 In certain cases, no question of illegality strictly so-called arises, but statute declares the contract to be void. In other words, statute law recognises the same distinction as the common law between illegality and voidness (as to which see para 836 ante). An illegal contract is, of course, void in the sense that no action may be brought to enforce it. For example, any term in a commercial contract which prohibits or demands certain union membership or recognition to fulfil the contract is void: see the Trade Union and Labour Relations (Consolidation) Act 1992 ss 144, 145, 186, 187 (as amended); and EMPLOYMENT vol 40 (2009) PARAS 1018-1019; EMPLOYMENT vol 41 (2009) PARAS 1150-1151. Another example is a policy of marine insurance which is made in terms of 'interest or no interest': see the Marine Insurance Act 1906 s 4; but see the Marine Insurance (Gambling Policies) Act 1909, which makes such policies illegal where the insured does not have any bona fide interest; and INSURANCE vol 25 (2003 Reissue) para 386 et seq. Notwithstanding that this legislation refers to the policies as 'void', there has been a tendency in the cases to hold that void here means 'illegal', a matter which affects the right to the return of the premiums: see eg *Harse v Pearl Life Assurance Co*[1904] 1 KB 558, CA (Life Assurance Act 1774); *Gedge v Royal Exchange Assurance Co*[1900] 2 QB 214 (Marine Insurance Act 1745, predecessor of the Marine Insurance Act 1906). However, it was held in *Re London County Commercial Reinsurance Office Ltd*[1922] 2 Ch 67 at 85 per PO Lawrence J, that 'void' in the Act of 1906 did not mean 'illegal'.

See further para 876 post.

7 See paras 607, 624 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(3) CONTRACTS AFFECTED BY STATUTE/868. Contracting out.

### **868. Contracting out.**

As a general rule, any person can enter into a binding contract to waive the benefits conferred on him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement<sup>1</sup>. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement<sup>2</sup>; and, in certain circumstances, it is expressly provided that any such agreement is void<sup>3</sup>.

By way of example of an exception to the general rule, an agreement between an employer and employee whereby the latter agrees to waive a statutory duty imposed on the former in the interests of safety is generally not binding on the employee<sup>4</sup>.

1 *Griffiths v Earl of Dudley* (1882) 9 QBD 357. 'In all cases where something not *ipsa natura* unlawful is prohibited by statute the words of prohibition must be taken as they stand; they must not be amplified in order to meet a supposed evil, or restricted in order to protect a natural freedom': *Equitable Life Assurance Society of the United States v Reed* [1914] AC 587 at 596, PC (waiver of statutory provisions as to life assurance policies). In *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL, it was held that the IATA system entered by contract as a clearing house for debts between airlines was a perfectly legal contract. However, in the particular circumstances of this case, it had the effect of giving a distribution of an insolvent airline's property which ran contrary to the insolvency legislation. For this purpose, therefore, it was void against public policy and the courts would apply standard UK insolvency law.

2 *Lake View and Star Ltd v Cominelli* [1937] AC 653, [1937] 2 All ER 285, PC; and see STATUTES.

3 See eg the Road Traffic Act 1988 s 148 (as amended) (motor insurance); and INSURANCE; the Law of Property Act 1925 s 146(12) (relief against forfeiture); *Rajbenback v Mamon* [1955] 1 QB 283, [1955] 1 All ER 12 (Rent Acts case); and LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 813; the Defective Premises Act 1972 s 6(3) (duties in connection with provision of premises); and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS; LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 475. As to the statutory restriction of exclusion clauses see also para 819 et seq ante.

4 See *Baddeley v Earl Granville* (1887) 19 QBD 423; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999, HL; and EMPLOYMENT vol 39 (2009) PARA 32.

## **UPDATE**

### **868 Contracting out**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(i) Enforcement of the Contract/A. ILLEGAL CONTRACTS/869. Introduction.

## **(4) EFFECT OF INVALIDITY**

### **(i) Enforcement of the Contract**

#### **A. ILLEGAL CONTRACTS**

##### **869. Introduction.**

This section of the title is concerned with the enforceability of the contract<sup>1</sup> if it is illegal<sup>2</sup>. In this context a distinction must be drawn between illegality at common law and illegality arising from statutory prohibition, express or implied, of the contract, though both may be relevant in an individual case. There are two general principles.

The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have intent<sup>3</sup>.

The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute<sup>4</sup>. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable, whether the parties meant to break the law or not.

A significant distinction between the two classes is this: in the former class one has only to look and see what acts the statute prohibits<sup>5</sup>; it does not matter whether it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, what has to be considered is not what acts the statute prohibits, but what contracts it prohibits, and the intent of the parties is irrelevant; if the parties enter into a prohibited contract, that contract is unenforceable<sup>6</sup>.

1 As to the recovery of property transferred or money paid under illegal contracts see para 880 et seq post.

2 As to contracts which are illegal as opposed to merely void see paras 844-855, 858-860, 867 ante.

3 See *Skilton v Sullivan* (1994) Times, 25 March, CA; and para 874 post.

4 See para 870 et seq post.

5 Ie on the assumption that the source of the illegality at common law is statutory, not the common law itself.

6 *St John Shipping Corpn v Joseph Rank Ltd* [1957] 1 QB 267 at 283, [1956] 3 All ER 683 at 687 per Devlin J.

Note, however, that a statute may expressly provide that infringement is not to affect contractual rights, thus rendering the first principle irrelevant: see para 873 post. Quaere whether a statute could by implication render the first principle irrelevant.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(i) Enforcement of the Contract/A. ILLEGAL CONTRACTS/870. Contracts prohibited by statute.

### **870. Contracts prohibited by statute.**

In determining whether a contract is struck down by the relevant statute where that statute contains no express provision regarding the contractual rights of the parties<sup>1</sup> the first question is normally<sup>2</sup> one of construction<sup>3</sup>: does the statute intend to render the contract unenforceable (or, as it is often expressed, to prohibit the contract) by one or both of the parties or does it merely intend to impose the penalty, if any<sup>4</sup>, provided by it for contravention<sup>5</sup>? This issue may arise in the context of the formation of the contract or in the context of its performance. If the formation of the contract is prohibited by statute neither party may enforce it. Thus it has been held that where a statutory order forbade the buying or selling of a commodity except under licence, a seller could not recover damages for an unlicensed buyer's refusal to accept the commodity, even though the buyer had falsely represented that he did have the required licence<sup>6</sup>. On the other hand, the way in which a contract, which is lawful according to its terms, is performed may turn it into a contract prohibited by statute. Thus where the seller, under a contract for sale of non-utility (that is, non-controlled) goods upon which there was no statutory restriction, purported to perform by delivering utility (controlled) goods without the invoice required by regulations for such goods, he failed in his claim for the price<sup>7</sup>. Similarly, it has been held that where, under regulations, building works could not be executed without a licence, a builder could not recover his charges for unlicensed work<sup>8</sup>, even though he believed that a licence existed<sup>9</sup>.

Even if there is no express or implied prohibition in the statute, a contract may still be unenforceable by one or both parties by reason of an intention to break the law, but this result depends upon the principles of the common law<sup>10</sup>.

1 As to such express provisions see para 873 post.

2 In view of the principle that, even if a contract is not prohibited by statute, it may still be unenforceable because of an unlawful intention (see the text to note 10 infra; and para 874 post), it may be unnecessary to examine the question of construction if the facts of the case reveal an unlawful intention: see eg *Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd* [1973] 2 All ER 856, [1973] 1 WLR 828, CA.

3 As to the interpretation of statutes generally see STATUTES.

4 Cf *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, [1939] 1 All ER 513, PC.

5 For the matters taken into consideration on this issue of construction see para 871 post. Cf *Shelly v Paddock* [1980] QB 348, [1980] 1 All ER 1009, CA (interpretation of the Exchange Control Act 1947 s 5 (now repealed)).

6 *Re Mahmoud and Ispahani* [1921] 2 KB 716, CA. Quaere whether the result would have been the same had the seller delivered the goods and had sued for the price of the goods or their return. From the point of view of public policy, it is arguable that the court should refuse to lend any aid where the illegal contract is purely executory, lest it encourage the parties to break the law, but that the same principle should not necessarily apply to a contract which has been performed by the party not at fault (cf para 874 post). However, under the present law such an approach seems most unlikely in the case of statutory prohibition: see the 'building licence' cases in notes 8-9 infra. See also para 872 text and note 4 post.

As to collateral contracts and liability for misrepresentation in this context see para 875 post.

7 *B & B Viennese Fashions v Losane* [1952] 1 All ER 909, CA; see also *Anderson Ltd v Daniel* [1924] 1 KB 138, CA; and see *Marles v Philip Trant & Sons Ltd (Mackinnon, third party)* [1954] 1 QB 29 at 35, [1953] 1 All ER 651 at 656, CA, per Singleton LJ, at 37 and 658 per Denning LJ, and at 42 and 660-661 per Hodson LJ. Cf *Brecker Grossmith & Co v Canworth Group Ltd* [1974] 3 All ER 561 (counter-inflation legislation).

In cases like these, however, where a particular method of performance is prescribed for one party, the other party, if not implicated in the illegality, has the usual remedies on the contract: see para 872 post.

8 *Bostel Bros Ltd v Hurlock* [1949] 1 KB 74, [1948] 2 All ER 312, CA; *Jackson Stanfield & Sons v Butterworth* [1948] 2 All ER 558, CA; *Woolfe v Wexler* [1951] 2 KB 154, [1951] 1 All ER 635, CA; *Howell v Falmouth Boat Construction Co Ltd* [1951] AC 837, [1951] 2 All ER 278, HL; *A Smith & Son (Bognor Regis) Ltd v Walker* [1952] 2 QB 319, [1952] 1 All ER 1008, CA; *Young v Buckles* [1952] 1 KB 220, [1952] 1 All ER 354, CA.

As to recovery of charges up to the limit of the licence although that limit is exceeded see para 877 post.

9 *J Dennis & Co Ltd v Munn* [1949] 2 KB 327, [1949] 1 All ER 616, CA. But see now the Building Act 1984; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS. As to collateral contracts and misrepresentation in such cases see para 875 post.

10 See para 874 post.

## **UPDATE**

### **870 Contracts prohibited by statute**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(i) Enforcement of the Contract/A. ILLEGAL CONTRACTS/871. No express statutory provisions affecting contract: aids to construction.

### **871. No express statutory provisions affecting contract: aids to construction.**

In deciding whether a statute affecting a contract contains an implied prohibition of the contract or things done thereunder so as to render it unenforceable by one or both parties<sup>1</sup>, the whole context and purpose of the statute must be taken into account and no single consideration, however important, is conclusive<sup>2</sup>. The following have from time to time been used as guidelines in construing statutory provisions: if the penalty imposed by the statute is recurrent, that is to say, if it is imposed not merely once and for all but as often as the act is done, that amounts to a prohibition of the contract<sup>3</sup>; where the object of the legislature in imposing the penalty is merely the protection of the revenue the statute will not be construed as prohibiting contracts<sup>4</sup>; but where the penalty is imposed for the protection of the public (though it may also be for the protection of the revenue<sup>5</sup>), contracts infringing the statute must be taken to be prohibited<sup>6</sup>. Another important consideration is whether the act prohibited by the statute affects the core of the contract. If the contract has as its whole object the doing of the very act which the statute prohibits, there is generally a clear implication that the contract is also prohibited; but this is not the case if the prohibited act is merely incidental<sup>7</sup>. Thus it seems that, while a contract which has as its object the use of vehicles not licensed as required by statute would be prohibited by necessary implication<sup>8</sup>, there would not necessarily be any prohibition of contracts for the carriage of goods in unlicensed vehicles or for the repair or garaging of unlicensed vehicles<sup>9</sup>. A similar problem has occurred in insurance contracts. Where a company is not registered<sup>10</sup>, a contract of insurance is void, but it is unclear whether a reinsurance contract which is outside the mischief contemplated is enforceable<sup>11</sup>. A similar principle applies where the contract itself is perfectly lawful but the issue arises whether the infringement of a statute by one party in the course of performance prevents him enforcing the contract. Thus it has been held that infringement by a shipowner of shipping safety legislation did not prevent him recovering freight<sup>12</sup>; and that a landlord's failure to provide a rent book as required by statute did not prevent him recovering rent<sup>13</sup>.

<sup>1</sup> See para 870 ante.

<sup>2</sup> *St John Shipping Corp'n v Joseph Rank Ltd* [1957] 1 QB 267 at 287, [1956] 3 All ER 683 at 690 per Devlin J.

<sup>3</sup> *Bartlett v Vinor* (1692) Carth 251; *Cope v Rowlands* (1836) 2 M & W 149; *Smith v Mawhood* (1845) 14 M & W 452; *Melliss v Shirley Local Board* (1885) 16 QBD 446, CA; *Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch 624 at 630 per Buckley J.

<sup>4</sup> *Johnson v Hudson* (1809) 11 East 180; *Brown v Duncan* (1829) 10 B & C 93; *Wetherell v Jones* (1832) 3 B & Ad 221; *Smith v Mawhood* (1845) 14 M & W 452; *Learoyd v Bracken* [1894] 1 QB 114, CA.

<sup>5</sup> The two will often go together: *Shaw v Groom* [1970] 2 QB 504 at 521, [1970] 1 All ER 702 at 709, CA, per Sachs LJ.

<sup>6</sup> *Booth v Hodgson* (1795) 6 Term Rep 405 (illegal partnership for insurance); *Lightfoot v Tenant* (1796) 1 Bos & P 551 (shipment of goods contrary to statutory prohibition); *Ribbans v Crickett* (1798) 1 Bos & P 264; *Law v Hodson* (1809) 11 East 300 (bricks for sale required to be of a certain size); *Langton v Hughes* (1813) 1 M & S 593 (sale of drugs to be used in brewing); *Marchant v Evans* (1818) 2 Moore CP 14; *Cannan v Bryce* (1819) 3 B & Ald 179 (stock jobbing transactions); *Bensley v Bignold* (1822) 5 B & Ald 335 (printer's name to be affixed to work); *Little v Poole* (1829) 9 B & C 192; *Cundell v Dawson* (1847) 4 CB 376 (delivery of ticket by vendor of coals); *R v Gravesend Inhabitants* (1832) 3 B & Ad 240 (restriction on taking of apprentices by watermen); *Forster v Taylor* (1834) 5 B & Ad 887 (marking of vessels containing butter for sale); *Cope v Rowlands* (1836) 2 M & W 149 (unlicensed broker); *Fergusson v Norman* (1838) 6 Scott 794 (regulations as to pawnbrokers); *Taylor v Crowland Gas and Coke Co* (1854) 10 Exch 293 (unqualified person acting as conveyancer); *Victorian*

*Daylesford Syndicate Ltd v Dott* [1905] 2 Ch 624 (unregistered moneylender); *Anderson Ltd v Daniel* [1924] 1 KB 138, CA (delivery of statutory invoice on sale of fertilisers); *Re National Benefit Assurance Co Ltd* [1931] 1 Ch 46 (stamping of policies); *B & B Viennese Fashions v Losane* [1952] 1 All ER 909, CA (delivery of statutory invoice on sale of controlled goods); *Mohamed v Alaga & Co* [1998] 2 All ER 720 (contract breached solicitors' practice rules); *Commercial Life Assurance Co v Drever* [1948] SCR 306, [1948] 1 DLR 241, Can SC (unlicensed estate agent); *Kocotis v d'Angelo* (1957) 13 DLR (2d) 69, Ont CA (unlicensed electrician). As to building contracts carried out without licences see para 870 notes 8-9 ante.

7 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 at 287, 288, [1957] 3 All ER 683 at 690, obiter per Devlin J; and see *Crouch and Lees v Haridas* [1972] 1 QB 158, [1971] 3 All ER 172, CA (agreement for payment in consideration of supplying information in relation to accommodation contrary to the Accommodation Agencies Act 1953); *Curragh Investments Ltd v Cook* [1974] 3 All ER 658, [1974] 1 WLR 1559 (failure to register under Companies Acts; insufficient nexus between statute and contract).

8 Cf *Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd* [1973] 2 All ER 856, [1973] 1 WLR 828, CA.

9 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 at 287, [1956] 3 All ER 683 at 690, obiter per Devlin J; *Archbalds (Freightage) Ltd v S Spangle Ltd* [1961] 1 QB 374, [1961] 1 All ER 417, CA.

10 Ie under the Insurance Companies Act 1982 ss 2-7 (as amended); see INSURANCE vol 25 (2003 Reissue) para 31 et seq.

11 Such a contract is unenforceable: *Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil* [1985] QB 966, [1984] 3 All ER 766; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216, sub nom *Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat* [1987] 2 All ER 152, CA. But, to the contrary, see *Stewart v Oriental Fire and Marine Insurance Co Ltd* [1985] QB 988, [1984] 3 All ER 777.

12 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683.

13 *Shaw v Groom* [1970] 2 QB 504, [1970] 1 All ER 702, CA.



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### **872. Statutory illegality may affect one or both parties.**

Where on its proper construction a statute is intended to affect contractual rights<sup>1</sup>, it is also a question of construction whether it affects the rights of one or both parties<sup>2</sup>. There is no general rule that ignorance of the facts constituting the illegality entitles a party to enforce the contract<sup>3</sup>; and it seems that where the statute prohibits the very formation of the contract neither party may enforce it even if ignorant of the illegality<sup>4</sup>. Where, however, the statute prescribes a method of performance by one party for the protection of the general public or a class of persons and a penalty is imposed on the party not complying with that method of performance, the contract, while unenforceable at the suit of that party, is enforceable at common law by the other<sup>5</sup> provided that other does not assist or participate in the illegal performance<sup>6</sup>.

1 See paras 870-871 ante.

2 In *Shelley v Paddock* [1980] QB 348, [1980] 1 All ER 1009, CA, the defendants had defrauded the plaintiff over the sale of a house in Spain. The payments that the plaintiff had made were in breach of exchange control regulations then in force, but she was unaware of this. It was held that she could recover, as she was an innocent party.

3 *Mohamed v Alaga & Co* [1998] 2 All ER 720. Cf the position where there is no prohibition of contracts in the statute but the illegality arises at common law through infringement of a statutory rule: see para 874 post.

4 *Re Mahmoud and Ispahani* [1921] 2 KB 716, CA; *Anderson Ltd v Daniel* [1924] 1 KB 138 at 149, CA, per Atkin LJ. In *Re Mahmoud and Ispahani* supra the statute made it illegal to 'buy or sell or otherwise deal in' the commodity without a licence, thus clearly extending the statutory provision to both parties. However, in *Chai Sau Yin v Liew Kwee Sam* [1962] AC 304, PC, the statute merely made it an offence for an unlicensed person to purchase the commodity. It was nevertheless held that the innocent seller could not recover the price. Cf *Bloxsome v Williams* (1824) 3 B & C 232 (for differing views as to this case see *Re Mahmoud and Ispahani* supra at 726 per Bankes LJ, and at 730 per Scrutton LJ); *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA (second hire-purchase agreement: see further para 882 post) and *Wilkie v Brown* (1946) 41 QJP 139 (Qld).

5 *Anderson Ltd v Daniel* [1924] 1 KB 138, CA, obiter; *Marles v Philip Trant & Sons Ltd* [1953] 1 All ER 645.

6 See para 874 post.

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### **873. Express statutory provisions affecting contract.**

Sometimes a statutory provision affecting a contract will make express provision as to the civil rights of the parties<sup>1</sup>. Thus the sale of a motor vehicle which does not comply with statutory regulations as to construction, weight and equipment is prohibited by statute and such a sale is a criminal offence, but it is provided that the contract is not thereby affected<sup>2</sup>. Similarly, a contract for the supply of goods is not rendered void or unenforceable simply by a contravention of the legislation relating to trade descriptions<sup>3</sup>. By contrast, certain bargains contravening the legislation against the sale of offices are expressly declared by statute to be void as well as constituting offences<sup>4</sup>.

1 In the event that the statute provides that contravention is not to affect contractual rights (see notes 2-3 *infra*), such a provision must also be applied even if it is alleged that the contract is illegal at common law by reason of a common prior intent to contravene the statute: see para 874 *post*.

2 See the Road Traffic Act 1988 s 75 (as amended); and ROAD TRAFFIC vol 40(1) (2007 Reissue) para 234; ROAD TRAFFIC vol 40(2) (2007 Reissue) para 694. See also *Thornley v Clegg* [1982] RTR 405, DC; *Streames v Copping* [1985] QB 920, [1985] 2 All ER 122, DC; *R v Nash* [1990] RTR 343, CA.

3 See the Trade Descriptions Act 1968 s 35. Breach of this legislation may however assist a general claim for breach of contract: see the Sale of Goods Act 1979 s 13 (as amended); the Supply of Goods and Services Act 1982 s 3; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 72-75.

4 See the Sale of Offices Act 1551 s 2 (as amended). As to contracts affected by statute see para 867 *ante*.

## **UPDATE**

### **873 Express statutory provisions affecting contract**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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#### **874. Contracts illegal at common law: relevance of guilty intent.**

Where a contract involves illegality at common law<sup>1</sup> (that is to say, where it is tainted with the commission of a crime<sup>2</sup> or other legal wrong<sup>3</sup>, or infringes one of those heads of public policy which make a contract illegal as opposed to merely void<sup>4</sup>), its enforceability depends upon the intention<sup>5</sup> of the parties. The general rule is that a contract involving the commission of a legal wrong or a contract with an unlawful purpose may not be enforced by either party<sup>6</sup> at law<sup>7</sup> or in equity<sup>8</sup>. The fact that one or both parties are ignorant that the contract involves a breach of the law or that their purpose in entering into the contract was unlawful is in such a case irrelevant; where a contract is made to do a thing which cannot be performed without a violation of the law it is unenforceable<sup>9</sup> whether the parties knew the law or not<sup>10</sup>.

Where, however, the contract is *ex facie* lawful and does not necessarily involve an unlawful act, a party's rights depend upon whether he participated in the illegality. A party who intends to perform the contract in an illegal manner or to exploit it for an unlawful purpose is debarred from enforcing the contract<sup>11</sup>; but a party who is not implicated in the illegality and does nothing to further it is not so debarred<sup>12</sup>. If a party, who at the time the contract was concluded was ignorant of the illegal purpose of the other, later discovers the illegality, he is released from his obligation to perform<sup>13</sup> and may recover on a quantum meruit for any performance he may have already rendered<sup>14</sup>; but, if he goes on with the contract and in any way assists or participates in the illegality, he may not enforce the contract in respect of the period after his discovery and participation<sup>15</sup>.

It is rather more difficult to state the law with certainty on the position of a party who has no prior intention to commit illegality<sup>16</sup>, but who in the course of performance commits an unlawful act. It has been seen that the enforcement of contractual rights will not generally be taken to be prohibited by a statute where a contravention of the statute takes place during performance unless the contravention affects the core of the transaction<sup>17</sup>. It is frequently said, however, that the common law<sup>18</sup> cannot include among the rights which it enforces rights which directly accrue to the person asserting them as a result of his own crime<sup>19</sup>; but, if this principle is applied literally, it would, in the case of statutory offences, nullify the above-mentioned rule as to implied prohibition by the statute<sup>20</sup>. It is, moreover, unlikely that this principle applies arbitrarily to common law offences on the one hand, but not to statutory offences on the other<sup>21</sup>. The best view would seem to be that the true principle governing illegality in performance at common law is similar to one of the principles of construction governing statutory prohibition of the contract or its performance<sup>22</sup>, namely, that an unlawful act (whether unlawful by common law or statute) committed by one party in the course of performance and not previously intended by him, does not prevent him enforcing the contract if it is merely incidental or collateral and does not affect the core of the transaction<sup>23</sup>.

Another principle applicable to illegality in the course of performance is that if a plaintiff must disclose his illegal act in order to make out his claim he must fail<sup>24</sup>; but this principle is of comparatively limited importance, for in many cases a party will not need to disclose or rely on his illegal act. Thus a carrier of goods making a claim for freight is only obliged to show that he delivered the goods in the same good order and condition as that in which he received them, not that he complied with every statute and regulation en route<sup>25</sup>.

1 As to the relationship between prohibition by statute and illegality at common law see paras 869-870 ante.

2 See para 839 ante.

3 See para 839 ante.

4 See paras 844-855, 858-860 ante.

5 The law presumes against an illegal intention: *Gale v Leckie* (1817) 2 Stark 107; *Bennett v Clough* (1818) 1 B & Ald 461; *Sissons v Dixon* (1826) 5 B & C 758; *Lewis v Davison* (1839) 4 M & W 654; *Fullarton v Mittelholzer* (1845) 6 QB 1022; *Waugh v Morris* (1873) LR 8 QB 202; *Hire-purchase Furnishing Co v Richens* (1887) 20 QBD 387, CA; *Hindley & Co Ltd v General Fibre Co Ltd* [1940] 2 KB 517.

6 The defendant may, of course, raise the illegality even if he is to blame for it (indeed the court is bound to take notice of the illegality, from whatever source the information comes: see para 838 ante). 'The objection that the contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy ... No court will lend its aid to a man who founds his cause of action upon an illegal or immoral act ... It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff': *Holman v Johnson* (1775) 1 Cowp 341 at 343 per Lord Mansfield.

<sup>7</sup> *Biggs v Lawrence* (1789) 3 Term Rep 454 (sale of goods to be smuggled into this country); *Clugas v Penaluna* (1791) 4 Term Rep 466; *Bernard v Reed* (1794) 1 Esp 91; *Lightfoot v Tenant* (1796) 1 Bos & P 551 (similar cases; but cf *Pellecat v Angell* (1835) 2 Cr M & R 311; and see CONFLICT OF LAWS); *Thomson v Thomson* (1802) 7 Ves 470 (contract for sale of command of East India ship); *Langton v Hughes* (1813) 1 M & S 593 (sale of drugs for use in brewing beer in contravention of statute); *Gas Light and Coke Co v Turner* (1840) 6 Bing NC 324 (lease contravening fire legislation); *Ritchie v Smith* (1848) 6 CB 462 (contravention of excise law); *Hamilton v Grainger* (1859) 5 H & N 40 (sale of liquor for purposes of brothel); *Cowan v Milbourn* (1867) LR 2 Exch 230 (hire of hall for blasphemous lecture; overruled on another point by *Bowman v Secular Society Ltd* [1917] AC 406, HL); *Scott v Macnaghten* (1908) Times, 25 November (claim for arrears of salary); *Smith's Advertising Agency v Leeds Laboratory Co* (1910) 26 TLR 335, CA (advertising illegal lottery); *Sykes v Bridges, Routh & Co* (1919) 35 TLR 464 (sale of permit to draw wine from bond); *Wylie v Lawrence Wright Music Co* (1932) 96 JP 156 (contravention of shops legislation; claim for recovery of wages); *Miller v Karlinski* (1945) 62 TLR 85, CA (agreement to defraud Inland Revenue; claim for arrears of salary); *JM Allan (Merchandising) Ltd v Cloke* [1963] 2 QB 340, [1963] 2 All ER 258, CA (supply of gaming machine). See also the cases cited in notes 10-25 infra.

8 *Re Cork and Youghal Rly Co* (1869) 4 Ch App 748, CA. In some cases an equitable remedy will be refused even where the common law will enforce the contract. Thus in *Branigan v Saba* [1924] NZLR 481 at 484, obiter per Salmond J, it was held that a plaintiff could recover damages for non-completion against a purchaser whom he did not know to be an alien enemy, but it was said that it was inconceivable that specific performance could be ordered in such a case, for that might amount to requiring the defendant to do an illegal act.

9 As to indirect enforcement see para 875 post.

10 *Waugh v Morris* (1873) LR 8 QB 202 at 208 per Blackburn J; *JM Allan (Merchandising) Ltd v Cloke* [1963] 2 QB 340, [1963] 2 All ER 258, CA.

11 *Cowan v Milbourn* (1867) LR 2 Exch 230 (overruled on another point by *Bowman v Secular Society Ltd* [1917] AC 406, HL); *Alexander v Rayson* [1936] 1 KB 169, CA; and see *Nash v Stevenson Transport Ltd* [1936] 2 KB 128, [1936] 1 All ER 906, CA; *Miller v Karlinski* (1945) 62 TLR 85, CA; *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683; *Kiriri Cotton Co v Dewani* [1960] AC 192, [1960] 1 All ER 177, PC; *Archbalds (Freightage) Ltd v S Spangle Ltd* [1961] 1 QB 374, [1961] 1 All ER 417, CA; *Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd* [1973] 2 All ER 856, [1973] 1 WLR 828, CA. See also *Berg v Sadler and Moore* [1937] 2 KB 158, [1937] 1 All ER 637, CA (where, in an agreement between B and R to defraud S, S received payment (of B's money) from R, but then refused to deliver the goods to R and in a subsequent action by B for return of his money, the court refused to so order. Though the agreement between B and R was undoubtedly illegal and unenforceable, it does not seem necessary to bring this illegality into the issue between B or R and S. Rather, the issue should depend upon the wider principle that no person can be heard to assert a cause of action arising from his own fraud. Where, however, a situation arises whereby X having practised a fraud on Y, Y seeks by action to rescind or set aside the contract, it seems that the court may apply the general principle of *restitutio in integrum* notwithstanding the fraud and order Y to return payments as a condition of relief: see *Barker v Walters* (1844) 8 Beav 92; and *London Assurance v Mansell* (1879) 11 ChD 363; and see INSURANCE.

12 *Wild v Harris* (1849) 7 CB 999; *Millward v Littlewood* (1850) 5 Exch 775 (actions for breach of promise where plaintiff did not know that other party was married; see also *Shaw v Shaw* [1954] 2 QB 429, [1954] 2 All ER 638, CA; the action for breach of promise of marriage has now been abolished: see the Law Reform (Miscellaneous Provisions) Act 1970 s 1); *Branigan v Saba* [1924] NZLR 481 (sale of land to alien enemy); *Mason v Clarke* [1955] AC 778, [1955] 1 All ER 914, HL (receipt drawn to avoid taxes); *Archbalds (Freightage) Ltd v S*

*Spanglett Ltd* [1961] 1 QB 374, [1961] 1 All ER 417, CA (carriage in unlicensed vehicle); *Fielding and Platt Ltd v Najjar* [1969] 2 All ER 150, [1969] 1 WLR 357, CA (invoice to defraud foreign authorities).

13 *Cowan v Milbourn* (1867) LR 2 Exch 230 (overruled on another point by *Bowman v Secular Society Ltd* [1917] AC 406, HL); cf *Graydon & Co v Pollux Properties Ltd* 1957 SLT (Sh Ct) 54. Strictly speaking, the innocent party was never under any obligation to perform the contract. See also *Newland v Simons and Willer (Hairdressers) Ltd* [1981] ICR 521 (employee was paid wages in cash so that the employer could defraud the revenue; if employee was aware of this he would be debarred from an action for unfair dismissal); cf *Coral Leisure Group Ltd v Barnett* [1981] ICR 503.

14 *Clay v Yates* (1856) 1 H & N 73. See also para 859 ante; RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

15 *Jennings v Throgmorton* (1825) Ry & M 251; *Cowan v Milbourn* (1867) LR 2 Exch 230; *Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd* [1973] 2 All ER 856, [1973] 1 WLR 828, CA. It seems that knowledge alone is not enough to debar a party from recovering. Participation or implication may, however, consist in not preventing the other party carrying out his purpose: *Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd* supra at 862-863 and at 836 per Scarman LJ.

16 As to prior intention see note 11 supra. The rights of the innocent party are not of course affected by such unanticipated illegality in the course of performance: *Neilson v James* (1882) 9 QBD 546; *Marles v Philip Trant & Sons Ltd* [1953] 1 All ER 645; *Archbalds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, [1961] 1 All ER 417, CA.

17 See para 871 ante.

18 As to the relationship between statutory prohibition and illegality by common law see paras 869-870 ante.

19 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156, CA, per Fry LJ; *Beresford v Royal Insurance Co Ltd* [1938] 2 All ER 602 at 605, HL, per Lord Atkin.

20 For doubts as to the scope of this rule in relation to statutory offences see *Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197 at 219, 220, [1937] 2 All ER 243 at 254, CA, per Lord Wright MR (affd [1938] AC 586, [1938] 2 All ER 602, HL); *Marles v Philip Trant & Sons Ltd (Mackinnon, third party)* [1954] 1 QB 29 at 37, 38, [1953] 1 All ER 651 at 658, CA, per Denning LJ. In *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683 (see para 871 text and note 10 ante) Devlin J found it unnecessary to examine the effect of this rule, because, even if the rule extended to statutory offences, no part of the claim for freight could be clearly identified as being the excess illegally earned by overloading.

21 In particular, many acts will support a charge at common law or by statute. Further, the codification of the criminal law has thus far followed a pattern dictated mainly by convenience, so that it is impossible to say that common law offences are essentially different from statutory offences.

22 See para 871 ante.

23 See *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683.

24 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 at 291, [1956] 3 All ER 683 at 692 per Devlin J.

25 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683.

## UPDATE

### 874 Contracts illegal at common law: relevance of guilty intent

NOTE 6--Even if a contract is not manifestly illegal, the court may refuse to enforce it if there is persuasive evidence of an illegal purpose: *Birkett v Acorn Business Machines Ltd* [1999] 2 All ER (Comm) 429, CA.

NOTE 23--See *Colen v Cebrian (UK) Ltd* [2003] EWCA Civ 1676, [2004] ICR 568.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(i) Enforcement of the Contract/A. ILLEGAL CONTRACTS/875. Indirect enforcement.

### **875. Indirect enforcement.**

Wherever by reason of statutory prohibition or illegality at common law a party may not directly enforce a contract<sup>1</sup>, the general rule is that neither may he indirectly enforce it. Thus a creditor may not recover a prohibited loan under the guise of an action for money had and received<sup>2</sup>; a solicitor who is retained under a champertous agreement cannot claim under a quantum meruit for his services<sup>3</sup>; the court will refuse an account of money due under an illegal contract<sup>4</sup>; the court will set aside an arbitration award made under an illegal contract<sup>5</sup>; and a party who has supplied services to a solicitor in breach of the solicitors' practice rules cannot recover quantum meruit<sup>6</sup>.

Where, however, the plaintiff enters innocently into an illegal contract as a result of fraudulent misrepresentations made to him by the other party and suffers damage other than the defendant's failure to fulfill his contractual obligations<sup>7</sup>, the plaintiff may be able to recover damages for deceit<sup>8</sup> or negligence<sup>9</sup>. Furthermore, a plaintiff who has acted without negligence may in some cases be able to maintain an action for breach of a collateral warranty or contract<sup>10</sup> against a defendant who induces him<sup>11</sup> to perform a contract which he (the plaintiff) believes to be lawful but which is in fact prohibited by statute<sup>12</sup>. It would seem, however, that such an action would not avail a plaintiff where the very formation of the contract was prohibited by statute, for that would be tantamount to ignoring the statutory prohibition<sup>13</sup>.

1 See para 869 et seq ante.

2 *Boissevain v Weil* [1949] 1 KB 482, [1949] 1 All ER 146, CA; affd [1950] AC 327, [1950] 1 All ER 728, HL, without consideration of this point by the majority of the House of Lords, but approved by Lord Radcliffe (Lord Normand concurring). 'The law cannot de jure impute promises to repay, whether for money had and received or otherwise, which, if made de facto, it would inexorably avoid': *Sinclair v Brougham* [1914] AC 398 at 452, HL, per Lord Sumner.

As to restitutionary claims of this nature see RESTITUTION vol 40(1) (2007 Reissue) para 5.

3 *Wild v Simpson* [1919] 2 KB 544, CA. As to quantum meruit claims in general RESTITUTION vol 40(1) (2007 Reissue) paras 7, 113 et seq. As to champertous agreements see para 850 et seq ante.

4 *Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch 624.

5 *David Taylor & Son Ltd v Barnett* [1953] 1 All ER 843, [1953] 1 WLR 562, CA; cf *Prodexport State Co for Foreign Trade v ED and F Man Ltd* [1973] QB 389, [1973] 1 All ER 355; and see ARBITRATION vol 2 (2008) PARA 1280.

6 *Mohamed v Alaga & Co* [1998] 2 All ER 720.

7 The purpose of damages for deceit is to put the plaintiff in the position he would have been in had the fraud not been committed; it is not to put him in the position he would have been in had the contract been performed: see *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA. As to fraudulent misrepresentation generally see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 755 et seq.

8 *Burrows v Rhodes* [1899] 1 QB 816 (plaintiff tricked into taking part in Jameson Raid in 1895 (which was probably an offence under the Foreign Enlistment Act 1870) and suffered loss of leg, property and earnings). Quaere whether by analogy with this case damages could be recovered for a negligent misrepresentation (either under the Misrepresentation Act 1967 or at common law under *Hedley, Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL). See further MISREPRESENTATION AND FRAUD.

9 *McAll v Brooks* [1984] RTR 99, CA, where the fact that a person had paid for car hire after an accident by way of a contract with an unregistered insurer, did not prevent him recovering from the other party to the

accident in negligence. On the facts, he was not aware that the insurers were unregistered. The case may depend on the *in pari delictu* rule (see para 885 post), although the decision appears correct as a matter of general principle.

10 As to collateral warranties or contracts see para 753 ante.

11 Seemingly, whether the defendant acts fraudulently, negligently or innocently, since fault on the part of the representor is not a necessary foundation for a collateral warranty or contract: see para 753 ante.

12 *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525, [1955] 3 All ER 90, CA (owner promised builders that he would obtain all necessary licences). None of the cases relied upon by the court in that case (ie *Burrows v Rhodes* [1899] 1 QB 816; *Gregory v Ford* [1951] 1 All ER 121; *Road Transport and General Insurance Co Ltd v Adams (Irwin third party)* [1955] Crim LR 377) involved a claim against a defendant for failure to fulfil his contractual obligations, rather, they all turned on a breach of warranty collateral to the main purpose of the contract that the plaintiff would not be led into doing something illegal when performing the contract.

13 See eg *Re Mahmoud and Ispahani* [1921] 2 KB 716, CA (see para 870 ante). But cf *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525 at 536, [1955] 3 All ER 90 at 93, CA, per Denning LJ. See also *Sheridan v Dickson* [1970] 3 All ER 1049, [1970] 1 WLR 1328, CA, where the court refused on the facts to find any warranty, without discussing the issue of principle. However, the error in *Sheridan v Dickson* supra would appear to have been one of law (as to which see para 874 text and note 10 ante).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(i) Enforcement of the Contract/B. VOID CONTRACTS/876. Void contracts.

## **B. VOID CONTRACTS**

### **876. Void contracts.**

Certain contracts are rendered void (but not illegal) either by statute<sup>1</sup>, or by the common law as offending public policy<sup>2</sup>. Such contracts resemble illegal contracts in that they are unenforceable<sup>3</sup>, but they differ from illegal contracts in relation to severance<sup>4</sup>, their effect on related transactions<sup>5</sup> and, perhaps, the effect of transfers of property or payment of money<sup>6</sup>.

1 Cf *Ooi Boon Leong v Citibank NA* [1984] 1 WLR 723, 128 Sol Jo 300, PC; and see para 867 ante.

2 See paras 856-857, 861-866 ante. The matter may be one of interpretation: see *Rock Refrigeration Ltd v Jones* [1997] 1 All ER 1.

3 None of the problems of mistake or innocence which have faced the courts in the context of illegality (see para 869 et seq ante) seems to have arisen over void contracts. As to contracts which are commonly described as unenforceable see para 607 ante.

4 See para 877 post.

5 See para 879 post. In *Boddington v Lawton* [1994] ICR 478, the court held that the rules in restraint of trade of a body which was not a trade union were unenforceable. However, a member was not able to question the payment of money by the trustees where that was permitted by those rules.

6 See para 887 post.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(ii) Partial Illegality: Severance and Related Transactions/877. Severance of illegal and void provisions.

## **(ii) Partial Illegality: Severance and Related Transactions**

### **877. Severance of illegal and void provisions.**

A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or 'severed' from the contract and the rest of the contract enforced without them. This is sometimes referred to as the 'blue pencil test'. Nearly all the cases arise in the context of restraint of trade<sup>1</sup>, but the following principles are applicable to contracts in general.

First, as a general rule, severance is probably not possible where the objectionable parts of the contract involve illegality and not mere void promises<sup>2</sup>, at least where the illegal covenant forms a main part of the consideration or is against public policy<sup>3</sup>. However, in one type of case, the courts have adopted what amounts almost to a principle of severance by holding that, if a statute allows works to be done up to a financial limit without a licence but requires a licence above that limit, then, where works are done under a contract which does not specify an amount but which in the event exceeds the financial limit permitted without licence, the cost of the works up to that limit is recoverable<sup>4</sup>.

Secondly, where severance is allowed, it must be possible simply to strike out the offending parts; the court will not rewrite or rearrange the contract<sup>5</sup>.

Thirdly, even if the promises can be struck out as previously mentioned, the court will not do this if to do so would alter entirely the scope and intention of the agreement<sup>6</sup>.

Fourthly, the contract, shorn of the offending parts, must retain the characteristics of a valid contract, so that, if severance will remove the whole or main consideration given by one party, the contract becomes unenforceable<sup>7</sup>. Otherwise, the offending promise simply drops out and the other parts of the contract are enforceable<sup>8</sup>.

In certain cases, statutory provisions provide for what amounts to severance of objectionable promises<sup>9</sup>.

1 As to severance in contracts for restraint of trade see *Attwood v Lamont*[1920] 3 KB 571, CA; *Marshall v NM Financial Management Ltd*[1995] 4 All ER 785, [1995] 1 WLR 1461; and COMPETITION vol 18 (2009) PARAS 433-434.

For older cases on severance not involving restraint of trade see: *Bradburne v Bradburne* (1589) Cro Eliz 149; *Featherston v Hutchinson* (1590) Cro Eliz 199; *Bridge v Cage* (1605) Cro Jac 103; *Crisp v Gamel* (1606) Cro Jac 128; *Bruer v Sowthwell* (1647) Sty 63; *Pyke v Pulleyn* (1693) 1 Lut 343; *Harrington v Klopogge* (1784) 2 Brod & Bing 678n; *Ex p Mather* (1797) 3 Ves 373; *Mouys v Leake* (1799) 8 Term Rep 411; *Gaskell v King* (1809) 11 East 165; *Wigg v Shuttleworth* (1810) 13 East 87; *Howe v Synge* (1812) 15 East 440; *Newman v Newman* (1815) 4 M & S 66; *Gibbons v Hooper* (1831) 2 B & Ad 734; *Kerrison v Cole* (1807) 8 East 231; *Payne v Brecon Corp*n (1858) 3 H & N 572; *Re Burdett, ex p Byrne*(1888) 20 QBD 310, CA; *B v B* (1892) 8 TLR 636; *Re Isaacson, ex p Mason*[1895] 1 QB 333, CA.

2 *Best v Jolly* (1661) 1 Sid 38; *Morris v Chapman* (1672) T Jo 24; *Parkin v Dick* (1809) 11 East 502; *Shackell v Rosier* (1836) 2 Bing NC 634; *Cunard v Hyde* (1859) 2 E & E 1; *Lound v Grimwade*(1888) 39 ChD 605; *Miller v Karlinski* (1945) 62 TLR 85, CA; *Bennett v Bennett*[1952] 1 KB 249 at 253, 254, [1952] 1 All ER 413 at 417, CA, per Somervell LJ; *Kuenigl v Donnersmarck*[1955] 1 QB 515, [1955] 1 All ER 46. Contra *Kearney v Whitehaven Collieries Co*[1893] 1 QB 700, CA; *Fielding and Platt Ltd v Najjar*[1969] 2 All ER 150 at 153, [1969] 1 WLR 357 at 362, CA, obiter per Lord Denning MR; and see *Napier v National Business Agency Ltd*[1951] 2 All ER 264, CA; *South Western Mineral Water Co Ltd v Ashmore*[1967] 2 All ER 953, [1967] 1 WLR 1110. However, see *Geismar*

*v Sun Alliance and London Insurance Ltd*[1978] QB 383, [1977] 3 All ER 570, where the court, whilst not permitting recovery on a theft policy in respect of illegal goods, did permit recovery in respect of legal goods.

As to illegal contracts see paras 844, 855, 858-860, 867 ante. As to void contracts see paras 856-857, 861-866, 867 ante.

3 See *Royal Boskalis Westminster NV v Mountain*[1997] 2 All ER 929 at 947, CA, per Stuart-Smith LJ and at 957 per Pill LJ.

4 *Frank W Clifford Ltd v Garth*[1956] 2 All ER 323, [1956] 1 WLR 570, CA; see also *Brightman & Co v Tate*[1919] 1 KB 463; *J Dennis & Co Ltd v Munn*[1949] 2 KB 327, [1949] 1 All ER 616, CA; *Jamieson v Watt's Trustee*1950 SC 265; *Dunbar and Cook v Johnston* 1956 SLT (Sh Ct) 26.

5 For cases not concerned with restraint of trade see *Re Davstone Estates Ltd's Leases, Manprop Ltd v O'Dell*[1969] 2 Ch 378, [1969] 2 All ER 849; *Horwood v Millar's Timber and Trading Co Ltd*[1917] 1 KB 305, CA. For cases concerned with restraint of trade see *Goldsoll v Goldman*[1915] 1 Ch 292, CA; and COMPETITION vol 18 (2009) PARA 377 et seq.

6 See *Attwood v Lamont*[1920] 3 KB 571, CA; and COMPETITION vol 18 (2009) PARA 434. In *Carney v Herbert*[1985] AC 301, [1985] 1 All ER 438, PC, the court allowed severance of illegal mortgages from a contract for the sale of a company and enforced guarantees given by directors.

7 See *Goodinson v Goodinson*[1954] 2 QB 118, [1954] 2 All ER 255, CA (where, however, other consideration was found); and see para 857 ante.

8 See eg *Commercial Plastics Ltd v Vincent*[1965] 1 QB 623, [1964] 3 All ER 546, CA; *Ailion v Spiekermann*[1976] Ch 158, [1976] 1 All ER 497, DC (severance of illegal premiums on rent-controlled property); and see TRADE AND INDUSTRY vol 97 (2010) PARA 970.

9 See eg the Race Relations Act 1976 s 72(1); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM; the Resale Prices Act 1976 s 9(2). See also the Matrimonial Causes Act 1973 s 34(1)(b); and para 857 ante.

## UPDATE

### 877 Severance of illegal and void provisions

NOTE 9--Resale Prices Act 1976 repealed: Competition Act 1998 Sch 14 Pt I.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(ii) Partial Illegality: Severance and Related Transactions/878. Related agreements: illegal contracts.

### **878. Related agreements: illegal contracts.**

A contract or security not in itself illegal will be tainted with illegality and hence be unenforceable if it is founded upon another, illegal, contract<sup>1</sup>. Thus the following contracts or securities have been held unenforceable: a bond given in consideration of future illicit cohabitation<sup>2</sup>; a deed given as security for payment of the purchase price of land conveyed for an illegal purpose<sup>3</sup>; an indenture assigning a policy of assurance as security for payment of a bill of exchange given in fraud of creditors<sup>4</sup>; and half of a bank note given by way of pledge to secure payment for a debauch in a brothel<sup>5</sup>. The principle is not confined to transactions between the parties to the original illegal contract, for the following have been held to be unenforceable: a policy of insurance on an illegal voyage<sup>6</sup>; a guarantee of a debenture which was illegal as involving financial assistance by a company in the purchase of its own shares<sup>7</sup>; and a loan by A to B to enable B to pay off an illegal loan from C<sup>8</sup>. However, where a third party is involved, he may enforce the agreement or security if he had no knowledge of the illegal object or nature of the original contract<sup>9</sup>.

Notwithstanding the general rule, the second contract will be enforceable if, though factually connected with the original illegal contract, it is remote from it and cannot be said in reality to spring from, or be founded on it. Thus in the context of hire-purchase, it has been held that the illegality of a hire-purchase agreement entered into by a finance company does not taint the sale of the goods to the finance company even though the parties to that sale contemplate the subsequent illegal letting<sup>10</sup>; and where there was an illegal hire-purchase agreement between A and B, and A discounted the agreement by assignment to C, the agreement remained unenforceable by A or C against B, but the assignment was valid to the extent of allowing C to sue A on covenants in the assignment that A would pay in default of payment by B<sup>11</sup>.

An exception to the general rule of 'tainting' of related contracts is that where there is a genuine dispute as to the legality of a transaction, a bona fide compromise is valid and enforceable, at least where the parties have been legally advised, no undue advantage has been taken, and the terms of the compromise are reasonable<sup>12</sup>.

1 As to those contracts which are illegal as opposed to merely void see paras 844-855, 858-860, 867 ante.

2 *Walker v Perkins* (1764) 1 Wm Bl 517; and see *Benyon v Nettelford* (1850) 3 Mac & G 94; *Amory v Meryweather* (1824) 2 B & C 573; *Prole v Wiggins* (1836) 3 Bing NC 230. As to agreements in respect of illicit cohabitation see para 860 ante.

3 *Fisher v Bridges* (1854) 3 E & B 642; and see *Jennings v Hammond* (1882) 9 QBD 225.

4 *Geere v Mare* (1863) 2 H & C 339; and see *Clay v Ray* (1864) 17 CBNS 188.

5 *Taylor v Chester* (1869) LR 4 QB 309. As to limited interests in illegal contracts see para 882 post.

6 *Redmond v Smith* (1844) 7 Man & G 457; and see further INSURANCE.

7 *Heald v O'Connor* [1971] 2 All ER 1105, [1971] 1 WLR 497. As to financial assistance by a company in the purchase of its shares see COMPANIES vol 15 (2009) PARA 1226.

8 *Spector v Ageda* [1973] Ch 30, [1971] 3 All ER 417. See also *Cannan v Bryce* (1819) 3 B & Ald 179; *Shaw v Benson* (1883) 11 QBD 563, CA.

9 *Cuthbert v Haley* (1799) 8 Term Rep 390; *Cannan v Bryce* (1819) 3 B & Ald 179 at 185, obiter per Abbott CJ; *Spector v Ageda* [1973] Ch 30 at 44, [1971] 3 All ER 417 at 427, obiter per Megarry J.

10 *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd* [1969] 2 All ER 904, [1969] 1 WLR 1877; *Southern Industrial Trust Ltd v Brooke House Motors Ltd* (1968) 112 Sol Jo 798, CA; cf *Pye v BG Transport Service Ltd* [1966] 2 Lloyd's Rep 300.

The authority of *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd* supra is, however, somewhat weakened by *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210, [1970] 3 All ER 664, CA, which was founded on the same facts but involving a different defendant. Swanwick J at first instance found that the original sale to the finance company was illegal as involving a conspiracy to effect an unlawful purpose and this finding was not challenged before the Court of Appeal (see [1971] 1 QB 210 at 216, [1970] 3 All ER 664 at 666) and, although the Court of Appeal decided the case upon a different issue, Lord Denning MR at least appears to have accepted the correctness of Swanwick J's view on the illegality of the contract of sale.

See also *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 68, [1944] 2 All ER 579 at 581, CA.

11 *Portland Holdings Ltd v Cameo Motors Ltd* [1966] NZLR 571, NZ CA. See also *Kirzinger v Kalthoff* (1964) 46 WWR 547, 45 DLR (2d) 144 (Sask) (illegal share purchase by A from B, involving B's promise to resell the shares for A or repurchase them for the amount paid. Subsequent loan from B to A providing for repayment in cash or with the above shares. Held, since there was no evidence that the two dealings were substantially one transaction the loan was not tainted by the illegality of the share purchase).

12 *Binder v Alachouzou* [1972] 2 QB 151, [1972] 2 All ER 189, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(ii) Partial Illegality: Severance and Related Transactions/879. Related agreements: void contracts.

### **879. Related agreements: void contracts.**

With the important exception of certain betting transactions (which are governed by special statutory rules<sup>1</sup>), a contract or security which is connected with another contract which is merely void but not illegal<sup>2</sup> is not thereby necessarily invalidated<sup>3</sup>. However, where the original, void contract was substantially the whole consideration<sup>4</sup> for the related agreement or the related agreement was intended to be dependent upon the validity of the original contract, then the related agreement would also be unenforceable<sup>5</sup>.

Although betting transactions invalidated by statute are generally void, not illegal<sup>6</sup>, related transactions are generally unenforceable<sup>7</sup>; thus (1) money won upon a bet is not recoverable even though promised for fresh consideration under a new agreement<sup>8</sup>; (2) securities given in respect of wagers on games are deemed to have been given for an illegal consideration<sup>9</sup>; and (3) loans for betting are generally irrecoverable<sup>10</sup>.

1 See notes 6-10 infra.

2 As to contracts which are void but not illegal see paras 856-857, 861-867 ante.

3 There is no decisive authority on this point, though *Sharif v Azad* [1967] 1 QB 605, [1966] 3 All ER 785, CA, reaches this conclusion with respect to a contract which was declared by statute to be 'unenforceable'. It is submitted that the attitude of the courts towards severance of merely void promises (see para 877 ante) is a strong pointer towards not striking down related contracts. A further analogy is that guarantees (which were probably in reality indemnities) of ultra vires contracts (see para 837 ante) have been held valid: *Yorkshire Rly Wagon Co v Maclure* (1881) 19 ChD 478 (revsd on another point (1882) 21 ChD 309, CA); *Garrard v James* [1925] Ch 616.

A guarantee given in respect of an obligation incurred by a minor before 9 June 1987 (ie the commencement of the Minors' Contracts Act 1987: see s 5(2)) will not be unenforceable simply on the grounds that the principal contractor is a minor: see s 2; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 14. Prior to this, a guarantee of a minor's loan was void under the Infants Relief Act 1874 (now repealed): see *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207.

4 As to consideration generally see para 727 et seq ante.

5 Eg a bond providing compensation for breach of a void covenant in restraint of trade in the original contract.

6 But certain lotteries and gaming are illegal: see the Lotteries and Amusements Act 1976 s 1; and the Gaming Act 1968 Pt I (ss 1-8), Pt II (ss 9-25) (as amended); and LICENSING AND GAMBLING. A lottery that forms part of the National Lottery is not unlawful: see the National Lottery etc Act 1993 s 2(1).

7 As to the effect of betting contracts see LICENSING AND GAMBLING vol 67 (2008) PARA 319 et seq. For the contractual rights and obligations of the player and the game promoter under the National Lottery see the Rules for On-line Games and the National Lottery Game Procedures, obtainable at the date at which this volume states the law from the National Lottery, Tolpits Lane, Watford, WD1 8RN.

8 *Hill v William Hill (Park Lane) Ltd* [1949] AC 530, [1949] 2 All ER 452, HL; see further LICENSING AND GAMBLING.

9 See the Gaming Act 1835. For the position of a holder in due course where a negotiable instrument has been given for an illegal consideration see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1484.

10 See LICENSING AND GAMBLING.

### **UPDATE**

**879 Related agreements: void contracts**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTES 6-10--Gaming Acts 1835 and 1968, and Lotteries and Amusements Act 1976 repealed: Gambling Act 2005 Sch 17. As to the enforceability of gambling contracts see now ss 335-338; and LICENSING AND GAMBLING vol 67 (2008) PARA 327.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(iii) Property Transferred or Money Paid/A. ILLEGAL CONTRACTS/880. Introduction.

### **(iii) Property Transferred or Money Paid**

#### **A. ILLEGAL CONTRACTS**

##### **880. Introduction.**

One party to an illegal contract<sup>1</sup> may have transferred property or paid money to the other in pursuance of the contract. The question then arises whether the money or property may be recovered. Generally, the position is governed by the maxim *in pari delicto potior est conditio defendentis*<sup>2</sup>, so that where the parties are on an equal footing as regards the illegal contract<sup>3</sup> neither can recover any property or money transferred to the other in pursuance of the contract. However, with regard to property other than money this issue is intimately bound up with the effect of an illegal contract in transferring title<sup>4</sup>.

There are certain special rules in relation to the position of a trustee in bankruptcy. Except where the statutory provisions for the avoidance of fraudulent and voluntary settlements and fraudulent preferences<sup>5</sup> apply, a trustee in bankruptcy is in no better position than the bankrupt would have been in recovering money paid or property transferred in pursuance of an illegal transaction which took place before the commencement of the bankruptcy<sup>6</sup>; but, if the bankrupt's money has, after the commencement of the bankruptcy, been paid away under an illegal agreement, the trustee may recover the money, though the bankrupt, being party to the illegal agreement, could not have done so<sup>7</sup>.

1 As to contracts which are illegal as opposed to merely void see paras 844-855, 858-860, 867 ante.

2 Ie where both parties are equally at fault the condition of the defendant is the better.

3 For exceptions to the rule of non-recovery see paras 884-886 post.

4 See paras 881-882 post.

5 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 663 et seq.

6 *Re Mapleback, ex p Caldecott*(1876) 4 ChD 150, CA (stifling prosecution).

7 *Re Campbell, ex p Wolverhampton Banking Co*(1884) 14 QBD 32, DC (stifling prosecution).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(iii) Property Transferred or Money Paid/A. ILLEGAL CONTRACTS/881. Transfer of ownership of goods or land.

### **881. Transfer of ownership of goods or land.**

It now appears to be settled<sup>1</sup> that, where property has been transferred absolutely<sup>2</sup> under an illegal contract<sup>3</sup>, such transfer is effective to pass title in the property to the transferee. Thus it has been held that where, under an illegal scheme to deceive licensing authorities, A bought a lorry on B's behalf and delivered it to B, but later retook possession of the lorry, B could recover it or its value from A on the basis that the property in the vehicle had passed to him<sup>4</sup>. Similarly, where A bought cars from B and let them on hire-purchase to C, both contracts being illegal, A was able to recover damages for conversion from D, the employee of C, who had wrongfully disposed of the cars<sup>5</sup>. Also, where A made a deed of conveyance of land to B, their purpose being an illegal one, the deed was sufficient to support an action of ejectment<sup>6</sup> by B against A<sup>7</sup>; and, where B claimed possession of a dwelling house as proprietor of a registered charge taken to secure repayments from A who had subsequently defaulted on the repayments and disappeared, C who was in control of the dwelling house could not rely on an error in the contract between B and A making it illegal under the Moneylenders Act 1927 (now repealed) as B did not have to rely on the contract when asserting his title against C<sup>8</sup>.

The conclusion from these cases seems to be that, in relation to transfers of property, an illegal contract is not void<sup>9</sup>, but merely unenforceable, for none of these cases could have been decided in the same way simply by reference to the maxim *in pari delicto potior est conditio defendentis*<sup>10</sup>. Indeed, the court may look at the contract, notwithstanding its illegality, to determine whether property has passed<sup>11</sup>.

The general rule set out above regarding transfer of property is, of course, subject to any contrary indication in the statute rendering the contract illegal<sup>12</sup>, and it is also subject to the different principle applicable when the parties are not in *pari delicto*<sup>13</sup> or where there has been a timely repudiation of the illegal purpose<sup>14</sup>.

Where the parties to an illegal contract transfer property but intend that the transfer shall not be an effective one, the position is somewhat different, for the court will not lend its aid to the transferor to recover the property if, in order to do so, he has to rely on the illegal purpose, whether or not the transferee pleads the illegality as a defence<sup>15</sup>. Some cases assert a general principle that a party to an illegal contract may recover property which has been transferred under an illegal contract if he does not rely upon the illegal transaction<sup>16</sup>; but this view is to some extent inconsistent with the doctrine that an illegal contract is not necessarily void<sup>17</sup> and it is doubtful how far it is generally applicable<sup>18</sup>. It may be that the principle is relevant only where the contract remains executory on the part of the transferee and the transferor seeks to rescind<sup>19</sup>.

1 Despite dicta to the contrary in *Gas Light and Coke Co v Turner* (1839) 5 Bing NC 666 at 679, obiter per Tindal CJ (affd (1840) 6 Bing NC 324, Ex Ch); *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300 at 309, obiter per Parker J.

2 As to limited interests (eg leases, bailments, hire-purchase) see para 882 post.

3 See para 880 ante.

4 *Singh v Ali* [1960] AC 167, [1960] 1 All ER 269, PC. See also *Coplan v Coplan* [1958] OR 551, 14 DLR (2d) 426 (Ont CA) (indorsement of share certificates in blank and delivery to plaintiff effective to pass ownership to plaintiff).



5 *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210, [1970] 3 All ER 664, CA. See also *Gordon v Metropolitan Police Chief Comr* [1910] 2 KB 1080, CA; *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 70, [1944] 2 All ER 579 at 582, CA, obiter per du Parq LJ; *Simpson v Nicholls* (1838) 3 M & W 240, as revised in [1839] 5 M & W 702, obiter per Parke B.

In *Belvoir Finance Co Ltd v Harold G Cole Ltd* [1969] 2 All ER 904, [1969] 1 WLR 1877 (based upon the same events as *Belvoir Finance Co Ltd v Stapleton* supra) Donaldson J found for A in an action against E, an innocent purchaser of the goods from C; but the decision proceeds upon the basis that the original contract of sale was not illegal: see para 878 ante.

6 Ejectment was the predecessor of the modern action for recovery of land.

7 *Doe d Roberts v Roberts* (1819) 2 B & Ald 367; see also *Phillpotts v Phillpotts* (1850) 10 CB 85.

8 *Goodman & Sterling (Coventry) Ltd v Kent* [1974] CLY 3156, Coventry county court.

9 It is arguable that *Singh v Ali* [1960] AC 167, [1960] 1 All ER 269, PC (see note 4 supra) might be explained on the basis that the property in the goods passed by delivery thus leaving intact the supposed principle that an illegal contract is void (see note 1 supra). It is true that delivery, unsupported by any contract, may pass title to goods, as for example under a gift. But even there there must be an intention to give: see *Lady Hood of Avalon v MacKinnon* [1909] 1 Ch 476; and GIFTS. It might be argued that in a contractual situation the contract supplied the requirement of the intention to give and, if the contract was ineffective, so should the delivery be to pass title to the goods. That property in the goods passed by delivery cannot be argued in the other cases cited supra since in *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210, [1970] 3 All ER 664, CA; and *Belvoir Finance Co Ltd v Harold G Cole Ltd* [1969] 2 All ER 904, [1969] 1 WLR 1877, there was no delivery to the plaintiff (see also *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747 at 783, [1966] 2 All ER 414 at 427, CA, obiter per Winn LJ) and in *Doe d Roberts v Roberts* (1819) 2 B & Ald 367 the plaintiff had never entered into possession.

10 See para 880 text and note 2 ante. In *Singh v Ali* [1960] AC 167, [1960] 1 All ER 269, PC, and *Doe d Roberts v Roberts* (1819) 2 B & Ald 367, the plaintiff succeeded in an action for the property against the other party to the illegal contract, a result which conflicts with the maxim.

As between the transferee and a third party who wrongfully takes the property from him, the court in *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210 at 217, [1970] 3 All ER 664 at 667, CA, per Lord Denning MR, at 219 and 668 per Sachs LJ, suggested that if title did not pass under an illegal contract 'it would mean that anyone could take the property with impunity, because there would be no one who could show title to it'. However, see now the Torts (Interference with Goods) Act 1977 s 8; and TORT. As to the comparable principle in relation to land see *Chambers v Donaldson* (1809) 11 East 65 and *Doe d Carter v Barnard* (1849) 13 QB 945; and TORT.

11 See *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210 at 218, [1970] 3 All ER 664 at 668, CA, per Lord Denning MR.

12 See para 884 post; see also para 882 text to note 5 post.

13 See para 885 post.

14 See para 886 post.

15 *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494, PC. The result is therefore the same, but for a different reason, as in a transaction intended to be effective.

16 *Simpson v Bloss* (1816) 7 Taunt 246; *Fivaz v Nicholls* (1846) 2 CB 501; *A-G v Hollingworth* (1857) 2 H & N 416 at 423; *Taylor v Chester* (1869) LR 4 QB 309; *Taylor v Bowers* (1876) 1 QBD 291, CA; *Begbie v Phosphate Sewage Co* (1875) LR 10 QB 491 (affd (1876) 1 QBD 679, CA); *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1; *Re National Benefit Assurance Co Ltd* [1931] 1 Ch 46; *Berg v Sadler and Moore* [1937] 2 KB 158, [1937] 1 All ER 637, CA; *Harry Parker Ltd v Mason* [1940] 2 KB 590, [1940] 4 All ER 199, CA; and see *Mistry Amar Singh v Kulubya* [1964] AC 142, [1963] 3 All ER 499, PC.

17 See notes 1-11 supra.

18 Cf the similar formulation in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA. But under that case the 'relying upon the illegal transaction' seems to have been very narrowly interpreted: see para 882 post.

It might be argued that the existence of the rules, whereby the plaintiff who is not in pari delicto with the defendant (see para 885 post) or who has withdrawn from the illegal purpose (see para 886 post) may recover, is inconsistent with the view that an illegal contract is effective to pass a good title to property. However, in the

cases not involving equal fault there is always some other factor such as fraud, mistake or duress which enables the contract to be avoided or set aside at the instance of one party. The cases on withdrawal may embody a rule which is sui generis and which is designed to encourage compliance with the law.

19 See further para 887 note 9 post.

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## **882. Limited interests in property under illegal contracts.**

Just as ownership of property may pass effectively under an illegal contract<sup>1</sup>, so may limited interests in property. Thus an illegal hire-purchase agreement is effective to transfer the right to possess the goods<sup>2</sup>; it would seem that an illegal pledge entitles the pledgee to retain the goods until payment of the amount due<sup>3</sup>; and an executed illegal lease is effective to vest a term of years in the tenant<sup>4</sup>. The principle is, however, subject to any contrary indication in the statute rendering the contract illegal<sup>5</sup> and to the different rules applicable when the parties are not in *pari delicto*<sup>6</sup> or there has been a timely repudiation of the illegal purpose<sup>7</sup>.

In the case of limited interests the question arises whether, the transferee having broken<sup>8</sup> an important term of the contract, the transferor may determine the limited interest and recover the property or its value in the same way as he could if the contract were lawful<sup>9</sup>. At least in the case of a bailment, the rule is that a person's right to possess his own chattels will as a general rule be enforced against one who (without any claim of right) is detaining them or has converted them to his own use, even though it may appear from the pleadings, or in the course of the trial<sup>10</sup>, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim<sup>11</sup>.

The difficulty with the above principle is to decide whether the owner of goods 'founds his claim on the illegal contract', since it will commonly<sup>12</sup> be a breach of that contract that determines, or entitles him to determine, the limited interest. In one case, in which the above principle was set forth, machinery was bailed to the defendants under two<sup>13</sup> illegal hire-purchase agreements, and the defendants sold the machinery to a third party; and the owners succeeded in an action for conversion of the machinery against the defendants<sup>14</sup>. It must be taken, therefore, that, notwithstanding that the sales were breaches of the hire-purchase agreements, the owners of the goods were not in the circumstances founding their claim upon the illegal contract, perhaps because the sales themselves may have determined the bailments<sup>15</sup>. More decisive, however, is the fact that the court came to the same conclusion, and allowed the owners recovery, in respect of another hire-purchase agreement, under which the defendants had simply failed to keep up the payments. The inference from this can only be that the court will enforce an illegal contract to the extent of recognising an act of determination by the owner of goods for breach of the contract<sup>16</sup>.

In the case of limited interests in land there is no decisive authority, though logically the result should be the same with regard to leases and pure personalty. First, it is generally assumed that upon expiry of an illegal lease for a fixed term the landlord may recover possession<sup>17</sup>. Secondly, though on two occasions courts have expressly refused to give an opinion on the issue<sup>18</sup>, there would seem to be no essential difference for this purpose between non-payment of rent under a lease and non-payment of hire charges under a hire-purchase agreement, and accordingly<sup>19</sup> it seems probable that a landlord might recover possession of premises let under an illegal lease in the event of a breach of covenant<sup>20</sup>.

<sup>1</sup> See para 881 ante.

<sup>2</sup> *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA.

3 *Taylor v Chester* (1869) LR 4 QB 309, as explained in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 71, [1944] 2 All ER 579 at 583, CA, per du Parcq LJ; and see *Scarfe v Morgan* (1838) 4 M & W 270 at 281, obiter per Parke B.

4 *Feret v Hill* (1854) 15 CB 207; *Jajbhay v Cassim* 1939 AD 537 (SA); *Joe v Young* [1964] NZLR 24, NZ CA. See also *Alexander v Rayson* [1936] 1 KB 169 at 186, 187, CA, obiter per Romer LJ; but see *Gas Light and Coke Co v Turner* (1839) 5 Bing NC 666 (affd (1840) 6 Bing NC 324, Ex Ch); cf also *Amar Singh v Kulubya* [1964] AC 142, [1963] 3 All ER 499, PC; but a sufficient explanation of this case is that there were contrary indications in the statute: see further para 884 post.

5 *Joe v Young* [1964] NZLR 24, NZ CA ('shall have no effect'); see further para 884 post.

6 See paras 880 note 2 ante, 885 post.

7 See para 886 post.

8 The breach is not, of course, itself remediable by damages in that the contract is unenforceable: see para 869 et seq ante.

9 Eg to repossess or bring an action for conversion in the case of hire-purchase; or to forfeit a lease. As to the remedies of an owner who has granted a limited interest see generally BAILMENT; CONSUMER CREDIT; and LANDLORD AND TENANT.

10 As to the establishment of illegality see para 838 ante.

11 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 71, [1944] 2 All ER 579 at 582, CA. Cf para 881 text and notes 16-19 ante.

12 As to determination by effluxion of time see note 17 infra.

13 There was another agreement, as to which see note 16 infra.

14 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA (all three agreements).

15 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA, contains no discussion of the basis for the claim. It may be that the acts of the defendants in selling the machines were so fundamentally inconsistent with the bailments that they automatically terminated them (the agreements no doubt contained the customary prohibition on assignment: cf *Whiteley Ltd v Hilt* [1918] 2 KB 808, CA). There is some authority that this may happen in bailments: see *Fenn v Bittleston* (1851) 7 Exch 152 at 159 per Parke B; *North Central Wagon and Finance Co Ltd v Graham* [1950] 2 KB 7 at 15, [1950] 1 All ER 780 at 782, CA, per Cohen LJ. Furthermore, notwithstanding the general rule of the law of contract that a serious breach merely gives the innocent party the option to determine the contract, it is in some circumstances automatically determined by the breach: see para 1002 post. However, *North Central Wagon and Finance Co Ltd v Graham* supra did not directly involve the question of termination of a hire-purchase agreement, but rather the question of the right of the owners to bring an action in conversion against a third party: see *Reliance Car Facilities Ltd v Roding Motors* [1952] 2 QB 844, [1952] 1 All ER 1355, CA.

Much must depend upon the wording of the individual contract, a matter about which there is no information in the reports of *Bowmakers Ltd v Barnet Instruments Ltd* supra.

16 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA (the second agreement; though again there is no discussion of this point); cf *Thomas Brown & Sons Ltd v Fazal Deen* (1962) 108 CLR 391, Aust HC.

It is generally assumed that a limited interest under an illegal contract may be effectively determined by the effluxion of the time limited in the contract (see note 17 infra). By analogy with this principle the following argument may be put forward supporting the determination of the limited interest for 'breach'. The reason why the owner in a limited interest case may recover his property after expiry of the period of time stipulated in the agreement is because that period of time is the contractual measure of what he has surrendered of his ownership. In such a case the court has to look at the illegal agreement (and in a sense 'enforce' it) to see what is the period limited thereby. Similarly, it may be argued, if the owner creates a limited interest determinable for breaches, the provisions of the contract regarding breach are equally the contractual measure of what he has surrendered of his ownership and should equally be given effect by the court. The objections to this argument (which, however, are also objections to the decision in *Bowmakers Ltd v Barnet Instruments Ltd* supra) are: (1) that it comes perilously close to fully enforcing an illegal contract (see para 872 ante); (2) that it may encourage the party with the limited interest to perform the illegal contract because of the threat of effective 'repossession'; and (3) that it draws an arbitrary distinction between outright disposals and disposals of a limited interest, even though the latter may in reality be simply a method of outright disposal on secured credit (eg hire-purchase).

See generally on these issues the South African cases of *Jajbhay v Cassim* 1939 AD 537; *Peterson v Jajbhay* 1940 TPD 182 at 190, obiter per Greenburg JP; and see Coote, 'Another look at *Bowmakers v Barnet Instruments*' (1972) 35 MLR 38.

17 This is clearly assumed in *Alexander v Rayson* [1936] 1 KB 169, CA. Any other rule would impose a penalty out of all proportion to the landlord's wrong and would be tantamount to confiscation. See also *Gas Light and Coke Co v Turner* (1839) 5 Bing NC 666 at 667, obiter per Tindal CJ ('it was observed in the course of argument for the plaintiffs, that, as they had granted a lease for 21 years, such term was vested in the defendant, and that he would be able to hold himself in [possession] for the remainder of it ...'); affd (1840) 6 Bing NC 324, Ex Ch; and see *Charan Kaur v Vanmali* (1956) 23 EA 14 (East African CA).

18 *Gas Light and Coke Co v Turner* (1839) 5 Bing NC 666 (affd (1840) 6 Bing NC 324, Ex Ch); *Alexander v Rayson* [1936] 1 KB 169, CA.

19 Ie on the basis of *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA.

20 The landlord may not, of course, recover rent or damages for breach of any covenant, for that would amount to a direct enforcement of the contract.

There are also dicta in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 at 72, [1944] 2 All ER 579 at 583, CA, to the effect that its principle does not apply where it is unlawful to deal at all with the type of property involved, eg an obscene book. Cf *Elias v Pasmore* [1934] 2 KB 164; *R v Lomas* (1913) 110 LT 239, CCA; *R v Bullock* [1955] 1 All ER 15, [1955] 1 WLR 1, CCA.

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### **883. Money paid under an illegal contract.**

A claim for the return of money paid over may take one of four basic forms. It may be: (1) a personal action for a debt (for instance, on a loan); (2) a personal restitutionary claim for money had and received<sup>1</sup>; (3) an action in tort for the return of identifiable coins or notes or their value<sup>2</sup>; or (4) a proprietary claim in equity even where the money has been paid into a mixed fund<sup>3</sup>. However, all the cases on recovery of money paid under illegal contracts concern actions in debt or for money had and received; and the absence of cases in tort or on the basis of the equitable proprietary claim is no doubt accounted for by the much lower level of protection given by the law to ownership of money than to ownership of goods<sup>4</sup>.

Where a plaintiff seeks to recover money paid under an illegal contract the rule is that he may not do so unless he can make out his cause of action without reliance on the illegal contract<sup>5</sup>, and there does not seem to be a case in which a plaintiff has succeeded in doing this.

The above principle in relation to money paid under an illegal contract is subject to any contrary indication in any statute creating the illegality<sup>6</sup>; and to the different rules applicable where the parties are not in *pari delicto*<sup>7</sup> or where there has been a timely repudiation of the illegal purpose<sup>8</sup>.

A somewhat similar problem to that discussed above<sup>9</sup> concerns the duty of an agent to account to his principal for money received by him on the principal's behalf<sup>10</sup>. The general rule is that, although the agent may have received the money under an illegal contract, he is liable to account to his principal<sup>11</sup>; but where the agency is itself illegal he will not be liable so to account<sup>12</sup>.

1 See RESTITUTION vol 40(1) (2007 Reissue) para 5.

2 See *Miller v Race* (1758) 1 Burr 452. The relief is: (1) an order for delivery of the goods, and for payment of any consequential damages; or (2) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages; or (3) damages: Torts (Interference with Goods) Act 1977 s 3(2); and see TORT.

3 See *Sinclair v Brougham* [1914] AC 398, HL; and EQUITY.

4 Eg the fact that a bona fide purchaser without notice always acquires a good title: see *Clarke v Shee and Johnson* (1774) 1 Cowp 197. In so far as money is regarded as property rather than currency, no doubt the principles in paras 881-882 ante apply. Thus if A pays money to B under an illegal contract and this money remains identifiable, the reason A may not maintain an action in tort against B is that the illegal contract is effective to pass title to the coins or notes. See *Berg v Sadler and Moore* [1937] 2 KB 158 at 162, [1937] 1 All ER 637 at 641, CA, per Lord Wright MR. See generally TORT.

5 *Tomkins v Bernet* (1693) 1 Salk 22; *Collins v Blantern* (1767) 2 Wils KB 341; *Lowry v Bourdieu* (1780) 2 Doug KB 468; *Lubbock v Potts* (1806) 7 East 449; *Thistlewood v Cracroft and Darley* (1813) 1 M & S 500; *Re Scott, ex p Bell* (1813) 1 M & S 751; *Simpson v Bloss* (1816) 7 Taunt 246; *Ex p Brookes* (1822) 1 Bing 105; *Goodall v Lowndes* (1844) 6 QB 464; *Begbie v Phosphate Sewage Co* (1875) LR 10 QB 491 (affd (1876) 1 QBD 679, CA); *Allkins v Jupe* (1877) 2 CPD 375; *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724, CA; *Re Myers, ex p Myers* [1908] 1 KB 941; *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1; *Re National Benefit Assurance Co Ltd* [1931] 1 Ch 46; *Berg v Sadler and Moore* [1937] 2 KB 158, [1937] 1 All ER 637, CA.

As to this rule in relation to property transferred under an illegal contract see para 881 ante. It is necessary to apply this rule in order to deny recovery in claims for money because it is not possible to fall back on the principle that title to the actual notes or coins handed over passes under the illegal contract, since the actions for debt or money had and received are respectively contractual and restitutionary claims.

6 See para 884 post.

7 See *Shelley v Paddock* [1980] QB 348, 1 All ER 1009, CA; and para 885 post. For the meaning of 'in pari delicto' see para 880 note 2 ante.

8 See para 886 post. It is sometimes said that there is a further exception, namely that, where money has been deposited with a stakeholder to abide the result of an illegal transaction, it can be recovered from him by the depositor unless the stakeholder has paid the money over to the other party: see eg *Hampden v Walsh* (1876) 1 QBD 189. But all these cases concern wagering contracts, which are void but not illegal: see para 867 ante.

9 See the text to note 5 supra.

10 See generally AGENCY vol 1 (2008) PARA 82.

11 *Tenant v Elliott* (1797) 1 Bos & P 3; *Farmer v Russell* (1798) 1 Bos & P 296; *Williams v Trye* (1854) 18 Beav 366; *Bone v Ekless* (1860) 5 H & N 925; *Skyes v Beadon* (1879) 11 ChD 170 (where *Sharp v Taylor* (1849) 2 Ph 801 was discussed and doubted); *Bridger v Savage* (1885) 15 QBD 363, CA; *De Mattos v Benjamin* (1894) 63 LJQB 248; and see *Bousfield v Wilson* (1846) 16 M & W 185; *Johnson v Lansley* (1852) 12 CB 468.

12 *Booth v Hodgson* (1795) 6 Term Rep 405; *Knowles v Haughton* (1805) 11 Ves 168; *Battersby v Smyth* (1818) 3 Madd 110; *Skyes v Beadon* (1879) 11 ChD 170; *Harry Parker Ltd v Mason* [1940] 2 KB 590, [1940] 4 All ER 199, CA; cf *Davenport v Whitmore* (1836) 2 My & Cr 177.

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#### **884. Indications in statute contrary to general rule of non-recovery.**

Despite the general rule of non-recovery of property transferred<sup>1</sup> or money paid<sup>2</sup> under an illegal contract, the statute rendering the contract illegal may contain a provision, express or implied, to the effect that recovery is permissible<sup>3</sup>. An example of an express provision is that relating to illegal premiums on lettings of dwellings<sup>4</sup>.

A right in one party to recover property transferred or money paid by him under an illegal contract will be implied where the object of the statute is to protect persons in the transferor's position<sup>5</sup>.

1 See paras 881-882 ante.

2 See para 883 ante.

3 *Wainuiomata Golf Club Inc v Anker Developments Ltd* [1971] NZLR 278 (the words 'shall be deemed to be unlawful and shall have no effect' were held to prevent even the effects of illegality, although in that case the court also held that the plaintiff did not have to rely on the illegality to have his claim).

4 See the Rent Act 1977 s 125; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) para 934.

5 *Smith v Bromley* (1760) 2 Doug KB 696; *Browning v Morris* (1778) 2 Cowp 790; *Williams v Hedley* (1807) 8 East 378; *Atkinson v Denby* (1861) 6 H & N 778; *Barclay v Pearson* [1893] 2 Ch 154; *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192, [1960] 1 All ER 177, PC; *Mistry Amar Singh v Kulubya* [1964] AC 142, [1963] 3 All ER 499, PC; cf *Green v Portsmouth Stadium Ltd* [1953] 2 QB 190, [1953] 2 All ER 102, CA (purpose of racecourse betting legislation the regulation of betting, not the protection of bookmakers); and *Nash v Halifax Building Society* [1979] Ch 584, [1979] 2 All ER 19 (purpose of legislation to protect investors not borrowers and therefore charge enforceable against a borrower even though illegal).



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### **885. Parties not in *pari delicto*.**

Another exception to the general rule of non-recovery of property transferred<sup>1</sup> or money paid<sup>2</sup> under an illegal contract arises where the parties are not in *pari delicto*<sup>3</sup>; where, in other words, the party who made the transfer or payment is without blame, unlike the recipient. Thus where the recipient of the property or money has induced the transferor to enter into a contract by fraudulently concealing the illegality, the innocent party may recover it<sup>4</sup>; and the same rule applies where duress or oppression is exercised<sup>5</sup>. However, *prima facie* the parties to an illegal contract are in *pari delicto*; and, in order to recover money or property transferred in pursuance of such a contract, the onus is on the party seeking to recover to exculpate himself from participation in the illegality<sup>6</sup>.

It seems that quite apart from any misconduct on the part of the transferee of money or property under an illegal contract, the transferor may recover it if he acted under a mistake as to the facts rendering the contract illegal<sup>7</sup>.

1 See paras 881-882 ante.

2 See para 883 ante.

3 See para 880 note 2 ante.

4 *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482, CA; *British Workman's and General Assurance Co Ltd v Cunliffe* (1902) 18 TLR 502, CA; *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243, HL. Cf *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1 (fraud, but the plaintiff always aware of the improper nature of transaction); *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA (innocent misrepresentation, parties in *pari delicto*); and see *Shelley v Paddock* [1980] QB 348, [1980] 1 All ER 1009, CA.

Quaere whether the contracts of insurance in some of these cases were truly illegal: see para 867 ante. See further INSURANCE.

5 *Williams v Hedley* (1807) 8 East 378; *Smith v Bromley* (1760) 2 Doug KB 696; *Chappell v Poles* (1837) 2 M & W 867, as explained in *Nicholson v Gooch* (1856) 25 LJB 137 at 143; *Alsager v Spalding* (1838) 4 Bing NC 407; *Horton v Riley* (1843) 11 M & W 492; *Higgins v Pitt* (1849) 4 Exch 312; *Reynell v Sprye* (1852) 1 De GM & G 660; *Atkinson v Denby* (1862) 7 H & N 934, Ex Ch; *Re Lenzberg's Policy* (1877) 7 ChD 650; *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469; *Kearley v Thomson* (1890) 24 QBD 742 at 745, CA, per Fry LJ. Cf *Liebman v Rosenthal* 35 NYS 2d 875 (USA 1945) (oppression, but not by other party).

6 *Howarth v Pioneer Life Assurance Co Ltd* (1912) 107 LT 155.

7 *Oom v Bruce* (1810) 12 East 225 (the plaintiff who had insured goods on board Russian ship, in ignorance of fact that war had broken out with Russia, entitled to recover premium). See also *Hentig v Staniforth* (1816) 5 M & S 122; *Siffken v Allnutt* (1813) 1 M & S 39. Cf para 874 ante.

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### **886. Withdrawal from executory illegal contracts.**

Where an illegal contract is still executory<sup>1</sup>, the general rule of non-recovery of money or property<sup>2</sup> is displaced and a party may recover such items provided he repents and withdraws from the illegal purpose<sup>3</sup> and gives notice repudiating the contract before he brings the action<sup>4</sup>. If, however, the illegal purpose has been substantially performed, the law makes no allowance for repentance and the money or property can no longer be recovered<sup>5</sup>, unless the case falls within one of the other exceptions<sup>6</sup>.

1 See para 606 ante.

2 See para 880 et seq ante.

3 There must be a genuine withdrawal: *Bigos v Bousted* [1951] 1 All ER 92 (agreement to infringe exchange control legislation; defendant deposited share certificate as security, but plaintiff failed to carry out his promise to provide money; defendant unable to recover share certificate, since the contract had merely been rendered nugatory by the plaintiff's act). See also *Alexander v Rayson* [1936] 1 KB 169, CA; *Berg v Sadler and Moore* [1937] 2 KB 158, [1937] 1 All ER 637, CA. Cf *Shaw v Shaw* [1965] 1 All ER 638, [1965] 1 WLR 537, CA.

4 *Tappenden v Randall* (1801) 2 Bos & P 467; *Stainforth v Staggs* (1808) 1 Camp 398n; *Busk v Walsh* (1812) 4 Taunt 290; *Palyart v Leckie* (1817) 6 M & S 290; *Bone v Eckless* (1860) 5 H & N 925; *Symes v Hughes* (1870) LR 9 Eq 475; *Taylor v Bowers* (1876) 1 QBD 291, CA; *Herman v Jeuchner* (1885) 15 QBD 561, CA.

5 *Kearley v Thomson* (1890) 24 QBD 742, CA; *Re Great Berlin Steamboat Co* (1884) 26 ChD 616, CA; *Apthorp v Neville & Co* (1907) 23 TLR 575; *Re National Benefit Assurance Co Ltd* [1931] 1 Ch 46.

6 See paras 884-885 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/6. VOID AND ILLEGAL CONTRACTS/(4) EFFECT OF INVALIDITY/(iii) Property Transferred or Money Paid/B. VOID CONTRACTS/887. Void contracts.

## **B. VOID CONTRACTS**

### **887. Void contracts.**

There is singularly little authority on recovery of property transferred or money paid under a contract which, while offending against public policy or a statute, is merely void and not illegal<sup>1</sup>. Logically, if such contracts were void no rights should arise under them and anything transferred should be recoverable<sup>2</sup>; and this may be so in the event of a statute declaring a contract 'void' with no further provision<sup>3</sup>. In the only twentieth century case on void contracts at common law in this context<sup>4</sup>, the plaintiff paid money to the defendant under a marriage brokerage contract<sup>5</sup> and succeeded in her action for recovery of the money paid; but the implications of the decision in respect of void contracts in general are not entirely clear. The case was decided<sup>6</sup> on the basis that the money was recoverable by reason of an equitable form of relief against marriage brokerage contracts<sup>7</sup>; but the court<sup>8</sup> also held that the money was recoverable at common law as having been deposited with the defendant to abide the result of an event which never happened<sup>9</sup>.

1 As to contracts which are void but not illegal see paras 856-857, 861-867 ante.

2 Thus where a contract is void for mistake no title to property delivered passes to the transferee: see para 704 et seq ante. The assumption underlying *Bell v Lever Bros Ltd*[1932] AC 161, HL, is that had the contract been void for mistake the money paid would have been recoverable: see RESTITUTION vol 40(1) (2007 Reissue) paras 34, 42, 106; and MISTAKE vol 77 (2010) PARA 7.

3 But even here the law is not consistent. Thus there are special rules with regard to betting, and money actually paid under a bet is generally not recoverable: see LICENSING AND GAMBLING. Loans for betting may or may not be recoverable according to the circumstances: see LICENSING AND GAMBLING. Although insurances effected without an insurable interest are commonly regarded as merely void, there has been a tendency in the past to treat them as illegal: see para 867 ante.

4 *Hermann v Charlesworth*[1905] 2 KB 123, CA.

5 As to marriage brokerage contracts see para 863 ante.

6 See the decisions of Collins MR and Cozens-Hardy LJ in *Hermann v Charlesworth*[1905] 2 KB 123, CA.

7 Citing *Arundel v Trevillian* (1635) 1 Rep Ch 87; *Drury v Hooke* (1686) 1 Vern 412; *Hall v Potter* (1695) 3 Lev 411, HL; *Roberts v Roberts* (1730) 3 P Wms 66.

8 See the decisions of Collins MR and Matthew LJ in *Hermann v Charlesworth*[1905] 2 KB 123, CA.

9 It is impossible to state with certainty the effect on transfers of property or money of contracts void at common law as offending public policy. With regard to transfers of property, since it now appears to be established that an illegal contract is effective to pass title to the transferee (see paras 881-882 ante) it can hardly be the case that so-called void contracts, which are less objectionable, are any less effective. The difference would seem to lie in the situation (as in *Hermann v Charlesworth*[1905] 2 KB 123, CA) where the transferee has not fully performed his side of the contract. Where the contract is illegal, the transferor who seeks to rescind the contract and recover his property will be met by the *in pari delicto* rules (see paras 880-886 ante), but where the contract is merely 'void' he will not. Cf *Hermann v Charlesworth* supra at 136 per Matthew LJ: 'the real nature of [a marriage brokerage contract] is that it is nudum pactum, and the law declares that it imports no consideration, and that no rights arise under it. The position, where the contract is nudum pactum and executory is that while unperformed either party may rescind it. The plaintiff has rescinded the contract, and I do not see why effect should not be given to that rescission'.

With regard to money paid, as with transfers of property there seems no reason to believe that where one party under such a 'void' contract has fully performed his side of the bargain, the other may recover any money paid over. If, however, the payee has not performed, there seems every reason to believe that the payer would succeed in an action for money had and received if he could show a total failure of consideration (as to which see RESTITUTION vol 40(1) (2007 Reissue) para 87 et seq). In *Hermann v Charlesworth* supra there had been no total failure of consideration, for services had been rendered under the agreement, but the recipient of the money was treated as a stakeholder under a wagering contract.

It may be that so called 'void' contracts in this context are no more void than illegal ones, but merely unenforceable; cf para 881 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(1) IN GENERAL/888. Impossibility, frustration and mistake.

## 7. IMPOSSIBILITY AND MISTAKE

### (1) IN GENERAL

#### 888. Impossibility, frustration and mistake.

The problems dealt with in the following paragraphs<sup>1</sup> concern situations where the parties have reached agreement but the question arises whether the existence or non-existence of some fact, or the occurrence or non-occurrence of some event, destroys the basis upon which that agreement was reached so that the agreement is discharged or in some other way vitiated. That situation is sometimes described as 'mistake'. However, in utilising that description, the following distinction must be borne in mind: if mistake operates at all in contract, it operates so as to negative or in some cases nullify consent<sup>2</sup>.

A mistake negatives consent where, on ordinary offer and acceptance principles, it prevents any agreement coming into existence. This may be because of a mistake as to the person with whom one is contracting<sup>3</sup>, or as to the subject matter of the contract<sup>4</sup>, or as to the terms of the contract<sup>5</sup>.

A mistake nullifies consent where the parties reach agreement, but that agreement may be nullified because that agreement was made under a fundamental mistaken assumption. In this circumstance, the effect of the mistake may differ according to whether the mistake renders the contract impossible to perform<sup>6</sup> or not<sup>7</sup>.

These rules might be seen in terms of good faith dealings<sup>8</sup>.

1 See paras 889-919 post.

2 *Bell v Lever Bros Ltd*[1932] AC 161 at 217, HL, per Lord Atkin.

3 See paras 704-706 ante.

4 See para 707 ante.

5 See para 708 ante. As to the special plea of non est factum see para 687 ante.

6 See para 889 post.

7 See paras 895-896 post.

8 See para 613 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(1) IN GENERAL/889. Impossibility and frustration in general.

### **889. Impossibility and frustration in general.**

Generally<sup>1</sup>, a contract which is incapable of performance at the time when it is made will be void ab initio<sup>2</sup>, whereas subsequent impossibility brings a valid contract to an end, generally from the moment of impossibility<sup>3</sup>. In the case of either type of impossibility, however, it may be on the proper construction of the contract that either or both of the parties has made an absolute promise so that non-performance will not be excused<sup>4</sup>.

Even where performance is not physically or legally impossible, if an event occurs which strikes at the basis of the contract so as to frustrate the practical purpose of the contract, further performance is excused<sup>5</sup>. The expression 'frustration' is now generally used to denote cases of subsequent physical or legal impossibility as well as cases of frustration of the commercial venture<sup>6</sup>.

However, there are special considerations applicable in the case of: relative impossibility<sup>7</sup>; impossibility caused by one of the contracting parties<sup>8</sup>; where the parties exhibit a contractual intention in relation to that impossibility<sup>9</sup>; or alternative promises<sup>10</sup>.

1 But see the text and note 4 infra.

2 See para 894 post.

3 See para 909 post. For the position where performance is rendered impossible by the conduct of one of the parties see para 891 post.

4 See paras 892, 894, 906 post.

5 See para 897 et seq post.

6 See eg the Law Reform (Frustrated Contracts) Act 1943 s 1(1); and *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 198, [1941] 2 All ER 165 at 194, HL, per Lord Porter.

7 See para 890 post.

8 See para 891 post.

9 See para 892 post.

10 See para 893 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(1) IN GENERAL/890. Relative impossibility.

**890. Relative impossibility.**

Whether it is alleged that the contract is physically or legally impossible to perform or merely that there has been an event which frustrates the commercial venture, a party will not escape liability for non-performance by showing an impossibility referable solely to his individual ability or circumstances<sup>1</sup>, or that he finds the contract unduly difficult or onerous to perform<sup>2</sup>.

1 *Thornborow v Whitacre* (1705) 2 Ld Raym 1164 (the geometric progression case).

2 See para 904 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(1) IN GENERAL/891. Impossibility caused by a party to the contract.

**891. Impossibility caused by a party to the contract.**

Subsequent impossibility or frustration brought about by the conduct of one of the parties will as a rule amount to a breach of contract by him<sup>1</sup> and will not excuse his non-performance, though it may release the other party from his obligation to perform his promise<sup>2</sup>. Where impossibility brought about by the conduct of one of the parties exists at the time the contract is made, it may be that on the proper construction of the contract he will have warranted the possibility of performance<sup>3</sup>.

1 *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 at 717, [1940] 2 All ER 445 at 454-455, HL, per Lord Atkin. See also para 786 ante. As to the effect of breach of contract see paras 986-1012 post. For the effect of fault in relation to frustration see para 899 post.

2 For discharge in cases of breach see paras 989-1012 post.

3 See the cases cited in para 894 notes 5-7 post.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(1) IN GENERAL/892. Intention of the parties: acceptance of the risk of impossibility.

### **892. Intention of the parties: acceptance of the risk of impossibility.**

A party who makes an absolute promise accepts the risk of performance being or becoming impossible<sup>1</sup>, and is not free of liability if he fails to perform, even though this is not due to any fault on his part<sup>2</sup>. The true principle seems to be that some contracts are absolute in their nature, and in these the promisor warrants the possibility of performance; the principle is not that all contracts prima facie should be performed whether performance is possible or not<sup>3</sup>. Whether or not the contract is absolute will generally be a question of construction<sup>4</sup>, and a contract which is absolute in terms is not necessarily absolute in effect<sup>5</sup>; but it seems that a particular type of contract may be regarded as absolute as a matter of law, without reference to the intention of the parties<sup>6</sup>.

If the impossibility of performance was known to the promisor at the time when the contract was made but was not known to the promisee, the former will be taken to have made an absolute promise<sup>7</sup>.

1 Absolute promises do not come within the general rules excusing performance or rendering the contract void in cases of impossibility or frustration.

2 *Paradine v Jane* (1647) Aleyn 26 (covenant to pay rent; lessee expelled from premises by armed force during Civil War); *Bullock v Dommitt* (1796) 6 Term Rep 650 (general covenant by lessee to repair obliges him to rebuild in case of destruction by accidental fire); *Redmond v Dainton* [1920] 2 KB 256 (covenant by lessee to repair obliged him to repair house damaged by enemy bomb); *Matthey v Curling* [1922] 2 AC 180, HL (lease of premises subsequently occupied by military authorities; see the Landlord and Tenant (Requisitioned Land) Acts 1942 and 1944); *Simper v Coombs* [1948] 1 All ER 306 (destruction of premises by bomb; for wartime provisions relating to such cases see the Landlord and Tenant (War Damage) Acts 1939 and 1941); *Marquis of Bute v Thompson* (1844) 13 M & W 487 (mining lease, mine exhausted); for the doctrine of frustration in relation to leases see para 901 post; and for the construction of covenants in leases and the determination of leases generally see LANDLORD AND TENANT; *Hills v Sughrue* (1846) 15 M & W 253 (performance of contract to proceed to a particular place and there load a full cargo of guano not excused by circumstance that no guano could be found there on arrival); *Hale v Rawson* (1858) 4 CBNS 85 (agreement for the sale of goods to be delivered on the arrival of a certain vessel, held an absolute contract to deliver in the event of the ship arriving and not conditional on the goods arriving with the vessel); *Ashmore & Son v CS Cox & Co* [1899] 1 QB 436 (performance of contract for the sale of goods, shipment to be by sailing ship between specified dates, not excused by fact that no ship was available); *Lewis Emmanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep 629; *Jones v St John's College* (1870) LR 6 QB 115 (undertaking in building contract to complete the work by a specified time, the contract providing for additions and alterations; held: absolute contract to complete within the time fixed, and not subject to any implied condition that the additions and alterations should be such as might reasonably be completed within the time); *Re Arthur, Arthur v Wynne* (1880) 14 ChD 603 (where a man covenanted to insure his life, it was held to be no excuse for a breach of the covenant that the life had become uninsurable owing to ill-health); *M'Donald v Workington Corp* (1893) 9 TLR 230, CA (performance of building contract not excused by defects in soil); *Vulcan Car Agency Ltd v Fiat Motors Ltd* (1915) 32 TLR 73 (commission payable to plaintiffs on receipt of money by defendants under a contract to supply motor cars, held payable although the contract had been cancelled owing to the inability of the defendants to get the cars, as the defendants had put themselves forward as being able to supply them); cf *Foster's Agency Ltd v Romaine* (1916) 32 TLR 545, CA (claim for commission on salary accruing from engagement procured by plaintiffs, the defendant having agreed to postpone the engagement for a year; held: plaintiffs not entitled to either commission or damages). Reference may also be made to *Brecknock and Abergavenny Canal Navigation Co v Pritchard* (1796) 6 Term Rep 750 (covenant to repair bridge); and see the observations of Willes J in *Lloyd v Guibert* (1865) LR 1 QB 115, Ex Ch; *Baily v De Crespigny* (1869) LR 4 QB 180 at 185.

For the presumption that a party does not intend to bind himself with reference to the future state of law see para 902 post.

3 *Joseph Constantine Steamship Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 203, 204, [1941] 2 All ER 165 at 198, HL, per Lord Porter.

4 A contract may, prima facie, be open to a number of interpretations: it may be that both parties make absolute promises, or only one does so, or that neither of them does so. For the interpretation of express contractual terms see para 772 et seq ante.

5 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* [1942] AC 154 at 184-185, [1941] 2 All ER 165 at 185-186, HL, per Lord Wright.

6 Eg a lease may not capable of being frustrated: see para 900 post.

7 *Wild v Harris* (1849) 7 CB 999 (promise to marry, promisee being ignorant that promisor was already married); *Millward v Littlewood* (1850) 5 Exch 775; *Shaw v Shaw* [1954] 2 QB 429, [1954] 2 All ER 638, CA; *Ennis v Purser* [1955] CLY 446 (similar cases); *Ashcroft v Crow Orchard Colliery Co* (1874) LR 9 QB 540 (undertaking to load with usual dispatch by charterer knowing his inability to do so).

## **UPDATE**

### **892 Intention of the parties: acceptance of the risk of impossibility**

NOTE 2--Where a seller makes an unqualified promise to sell, he bears the risk of a failure of his contemplated source of supply and cannot rely on the doctrine of frustration: *CTI Group Inc v Transclear SA* [2008] EWCA Civ 856, [2009] 2 All ER (Comm) 25.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(1) IN GENERAL/893. Alternative promises.

### **893. Alternative promises.**

When a promise is made in an alternative form and one alternative is impossible to perform, the question whether the promisor is bound to perform the other or is altogether excused depends on the intention of the parties to be ascertained from the nature and terms of the contract and the circumstances of the particular case<sup>1</sup>. The usual result in such a case will be that the promisor must perform the alternative which remains possible<sup>2</sup>; but it may be that on the proper construction of the contract there is not one obligation to be performed in alternative ways but one obligation to be performed in one way unless the promisor chooses to substitute another way, in which case, the primary obligation being impeded, the promisor is not bound to exercise the option for the benefit of the other party<sup>3</sup>.

1 See *Barkworth v Young* (1856) 4 Drew 1 at 24, 25, and cases there cited; *Anderson v Commercial Union Assurance Co* (1885) 55 LJQB 146 at 150, CA, per Bowen LJ. Where the promisor has elected which alternative he will perform and performance of that alternative subsequently becomes impossible, the promisor is not excused for failure to perform it: *Brown v Royal Insurance Co* (1859) 1 E & E 853. See further INSURANCE.

2 *Wigley v Blackwal* (1600) Cro Eliz 780; *Da Costa v Davis* (1798) 1 Bos & P 242; *Stevens v Webb* (1835) 7 C & P 60; *Marquis of Bute v Thompson* (1844) 13 M & W 487; *Barkworth v Young* (1856) 4 Drew 1; *McIlquham v Taylor* [1895] 1 Ch 53, CA; *Brightman & Co v Bunge y Born Lda Sociedad* [1924] 2 KB 619, CA (affd sub nom *Bunge y Born Lda Sociedad Anonima Commercial Financiera y Industrial of Buenos Aires v HA Brightman & Co* [1925] AC 799, HL); *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691 at 717, [1963] 1 All ER 545 at 551-552, HL, per Viscount Radcliffe and at 730 and at 559-560 per Lord Devlin.

3 *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, HL. See also *European Grain and Shipping Ltd v JH Rayner & Co Ltd* [1970] 2 Lloyd's Rep 239; *Koninklijke Bunge v Compagnie Continentale d'Importation* [1973] 2 Lloyd's Rep 44.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(2) INITIAL IMPOSSIBILITY AND MISTAKE/894. Impossibility ab initio.

## (2) INITIAL IMPOSSIBILITY AND MISTAKE

### 894. Impossibility ab initio.

A binding contract cannot arise from a promise which is manifestly incapable of performance either in fact or in law at the time when it is made<sup>1</sup>; and it may be that this is because in such a case there is no intention to create legal relations<sup>2</sup> or no consideration<sup>3</sup>. Similarly, where the initial impossibility is not known to the parties, the contract will, as a general rule, be void<sup>4</sup>. Thus where the subject matter of the contract has, without the knowledge of either party, ceased to exist (*res extincta*) before the contract was made, the contract may be void on the ground of mistake<sup>5</sup>. A similar principle applies where the property has never existed even though the parties believe otherwise<sup>6</sup>. It may be, however, that upon the proper construction of the contract a party warrants the existence or continued existence of the subject matter or purchases an adventure, so that he undertakes to deliver or to pay in any event<sup>7</sup>.

Similar to mistake as to the existence of the subject matter of the contract is mistake as to title, as where, unknown to the parties, the buyer is already owner of that which the seller purports to sell him (*res sua*). In such a case the parties intend to effect a transfer of ownership but such a transfer is, of course, impossible and the sale is void<sup>8</sup>.

1 *Hall v Cazenove* (1804) 4 East 477 (covenant in charterparty that ship should sail on or before date already past at time of agreement).

2 'Any transaction between two or more parties can, in my judgment, only result in a contract between them if they enter into that transaction with an intention to create binding contractual obligations or in circumstances in which such an intention must be attributed to them. The facts of the present case negative such an intention': *Beesley v Hallwood Estates*[1960] 2 All ER 314 at 322, [1960] 1 WLR 549 at 558 per Buckley J (affd [1961] Ch 105, [1961] 1 All ER 90, CA); followed in *Harvela Investments Ltd v Royal Trust Co of Canada Ltd*[1986] AC 207, [1985] 2 All ER 966, HL. As to intention to create legal relations see paras 718-726 ante.

3 As to consideration see paras 727-747 ante.

4 *Sheikh Bros Ltd v Ochsner*[1957] AC 136, PC (sisal cutting licence; agreement held void when land turned out to be incapable of producing the stipulated quantity; the case was decided under the Indian Contracts Act but the court considered that it was also applying the principles of English law); *Griffith v Brymer* (1903) 19 TLR 434; *Clark v Lindsay* (1903) 88 LT 198 (contracts to take rooms to see coronation procession at a time when the decision had already been taken to postpone the event); *The Salvador (No 2)* (1909) 25 TLR 727, CA; *The Salvador* (1909) 26 TLR 149 (retrial of previous case; contract to perform voyage which ship was incapable of doing); see also *Lord Clifford v Watts*(1870) LR 5 CP 577.

5 *Hitchcock v Giddings* (1817) Dan 1 (purchase of remainder expectant on estate tail which had been barred); *Strickland v Turner*(1852) 7 Exch 208 (sale of annuity, annuitant being then dead); *Kennedy v Thomassen*[1929] 1 Ch 426 (similar case); *Couturier v Hastie* (1856) 5 HL Cas 673 (sale of cargo no longer available); *Scott v Coulson*[1903] 2 Ch 249, CA (assignment of policy of insurance after death of assured); *Bell v Lever Bros Ltd*[1932] AC 161 at 217, 218, HL, per Lord Atkin. See also the Sale of Goods Act 1979 s 6 (contract for the sale of specific goods void where goods have perished at the time the contract was made); s 7 (agreement to sell specific goods void where goods perish before sale but after agreement to sell has been made); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 54-55. Another view, however, is that such contracts are not void at common law, merely unenforceable: *Svanosio v McNamara* (1956) 96 CLR 186, Aust HC.

6 *Galloway v Galloway* (1914) 30 TLR 531, DC (separation agreement made under belief that void marriage was valid); *Law v Harragin* (1917) 33 TLR 381 (similar case); *Associated Japanese Bank International Ltd v Crédit du Nord SA*[1988] 3 All ER 902, [1989] 1 WLR 255 (where the defendant guaranteed the lessee's payment under an equipment lease, the defendant's guarantee was held to be subject to an express or implied

condition precedent that the equipment existed); cf *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC.

7 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC (sale of non-existent tanker on non-existent reef); see also *Frederick E Rose (London) Ltd v William H Pim, Junior & Co Ltd* [1953] 2 QB 450 at 460, [1953] 2 All ER 739 at 747, CA, per Denning LJ. But cf the terms of the Sale of Goods Act 1979 s 6 (goods which have perished); and MISTAKE vol 77 (2010) PARA 19; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 54. As to conditional agreements see para 670 ante; and as to implied terms see para 778 et seq ante.

8 *Bell v Lever Bros Ltd* [1932] AC 161 at 218, HL, per Lord Atkin; citing *Cooper v Phibbs* (1867) LR 2 HL 149, where, however, the agreement was in fact set aside in equity (see para 896 note 6 post).

## **UPDATE**

### **894 Impossibility ab initio**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

## **UPDATE**

### **895-896 Mistake of quality at common law; Mistake in equity**

Material relating to these paragraphs has been revised and published under the title MISTAKE vol 77 (2010).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/897. In general.

### **(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION**

#### **(i) The Doctrine of Subsequent Impossibility and Frustration**

##### **897. In general.**

It frequently happens that a contract is silent<sup>1</sup> as to the position of the parties in the event that something happens subsequent to the formation of a contract<sup>2</sup> which renders its performance literally impossible, or only possible in a very different way from that originally contemplated<sup>3</sup>. In such cases, the law originally took the strict view that a promisor was bound by his express promise<sup>4</sup>; but in 1863 the courts relented and excused further performance by reason of an implied condition<sup>5</sup> under the doctrine of impossibility or frustration (hereafter called frustration). Subsequent cases accepted the development, whilst restricting it to a very narrow range of circumstances<sup>6</sup>.

As subsequently developed, the doctrine of frustration operates to excuse from further performance<sup>7</sup> where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist<sup>8</sup>, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. In more recent times, five propositions have been set out as the essence of the doctrine<sup>9</sup>. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises<sup>10</sup> so as to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances<sup>11</sup>. Secondly, the effect of frustration is to kill the contract and discharge the parties from further liability under it<sup>12</sup>, so that the doctrine cannot be lightly invoked but must be kept within very narrow limits and ought not to be extended<sup>13</sup>. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically<sup>14</sup>. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it<sup>15</sup>, but due to some outside event or extraneous change of situation<sup>16</sup>. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it<sup>17</sup>; nor does the mere fact that a contract has become more onerous allow such a plea<sup>18</sup>.

The mere fact that the parties apparently treated a contract as remaining in force until a late stage in their dispute does not conclusively rule out a plea of frustration<sup>19</sup>.

1 For the position where the parties have foreseen and/or made provision for an event see para 905 post.

2 Distinguish the situation where the event interfering with performance of the contract occurs before formation of the contract. This is termed initial impossibility or mistake: see paras 894-896 ante.

3 There is no frustration if only one of the possible ways of performing a contract has become impossible: *Twentsche Overseas Trading Co Ltd v Uganda Sugar Factory Ltd* (1944) 114 LJPC 25; *Hindley & Co Ltd v General Fibre Co Ltd* [1940] 2 KB 517; *Beves & Co Ltd v Farkas* [1953] 1 Lloyd's Rep 103; and cf the cases cited in para 893 notes 1-2 ante, particularly *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, HL.

4 See *Paradine v Jane* (1647) Aleyn 26; and para 892 note 2 ante. This doctrine was subject to a few limited exceptions: see *Atkinson v Ritchie* (1809) 10 East 530 at 534-535.

5 *Taylor v Caldwell* (1863) 3 B & S 826 (defendant took a contractual licence to use a music hall for concerts on four specified nights, but before the first night the hall was destroyed by fire. It was held that the defendant was not liable in damages since the contractual licence was subject to an implied condition that the hall continued to exist); and see note 10 infra.

6 Leaving aside express provisions in the contract as to what is to happen on the occurrence of the event, it has been said that the doctrine is 'not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains': *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724 at 752, [1981] 2 All ER 1030 at 1046, HL, per Lord Roskill. See further notes 13, 19 infra.

7 For time of frustration see para 910 post.

8 The decision in *Taylor v Caldwell* (1863) 3 B & S 826 in respect of the destruction of the subject-matter of the contract was soon extended to destruction of the envisaged commercial venture: *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125.

9 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA, per Bingham LJ.

10 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA; citing *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 510, PC; *Denny Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 275, [1944] 1 All ER 678 at 683, HL; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 171, [1941] 2 All ER 165 at 176, HL.

11 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA; citing *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 510, PC; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 183, [1941] 2 All ER 165 at 184-185, 191, HL; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 701, [1981] 1 All ER 161 at 176, HL.

12 See further para 909 post.

13 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA; citing *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 459, HL; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 715, 727, [1956] 2 All ER 145 at 150, 159, HL; *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724 at 752, [1981] 2 All ER 1030 at 1046, HL.

14 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA; citing *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 505, PC; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 527, PC; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 163, 170, 171, 187, 200, [1941] 2 All ER 165 at 171, 175, 176, 187, 196, HL; *Denny Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 274, [1944] 1 All ER 678 at 682-683, HL.

15 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA; citing *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 510, PC; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 530, PC; *Denny Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 274, [1944] 1 All ER 678 at 683, HL; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 728, [1956] 2 All ER 145 at 159-160. See also note 17 infra.

16 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA; citing *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 909, [1983] 1 All ER 34 at 44, HL.

17 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA; citing *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 452, HL; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 171, [1941] 2 All ER 165 at 176, HL; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 729, [1956] 2 All ER 145 at 160, HL; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 882, [1982] 3 All ER 394 at 406-407, CA; [1983] 1 AC 854 at 909, [1983] 1 All ER 34 at 44, HL. See also para 899 post.

18 *Kissavos Shipping Co SA v Empresa Cubana de Fletes, The Agathon* [1982] 2 Lloyd's Rep 211 (charterparty).

19 See para 904 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/898. Juristic basis.

### 898. Juristic basis.

Whilst the existence of the doctrine of frustration is well established<sup>1</sup>, its juristic basis remains uncertain. Originally, it was based upon an implied term<sup>2</sup>; then as turning upon the disappearance of the foundation of the contract<sup>3</sup>; but this is artificial and often fictitious in its operation<sup>4</sup> and takes no account of those cases where the parties have foreseen the possibility of the occurrence of the event<sup>5</sup>. In fact, the test of frustration is objective<sup>6</sup>. At one stage the doctrine was described as the imposition by the court of a just and reasonable solution<sup>7</sup>. Yet this last view, that a court may intervene where a post-contract change of circumstances caused hardship, has been rejected as too wide<sup>8</sup>, because it does not ask whether the character of the obligation was radically different in the new circumstances<sup>9</sup>. Instead, the last view requires the interpretation of the terms of the contract in the light of the nature of the contract and the relevant surrounding circumstances, and an inquiry whether those terms are wide enough to meet the new situation<sup>10</sup>. The conclusion is almost completely determined by what is ascertained as to mercantile usage and the understanding of mercantile men<sup>11</sup>; and, where the conclusion is one of an arbitrator, the court should interfere only where no reasonable person could have reached that conclusion<sup>12</sup>.

It would seem that the original (subjective) implied term theory has been displaced by the various more modern objective tests discussed above. However, it has been said that it is not necessary to attempt selection of any one of these theories as the true basis for frustration but that they shade into one another, and that a choice between them is a choice of what is most appropriate to the particular facts under consideration<sup>13</sup>.

1 See para 897 ante.

2 *Taylor v Caldwell* (1863) 3 B & S 826; *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 403, HL, per Lord Loreburn; *Court Line Ltd v Dant and Russell Inc* [1939] 3 All ER 314. Many of the older cases adhere to this theory, which suggests a subjective inquiry into the actual or presumed intention of the parties.

3 *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 406-407, HL, per Lord Haldane; *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132, [1938] 3 All ER 135. The difficulty is to ascertain what is the foundation of the contract: *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 687, 702, [1981] 1 All ER 161 at 166, 177, HL.

4 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 728, [1956] 2 All ER 145 at 160, HL, per Lord Radcliffe; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 687, [1981] 1 All ER 161 at 165, HL, per Lord Hailsham of St Marylebone LC.

5 See para 905 post.

6 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 728, [1956] 2 All ER 145 at 159, HL, per Lord Radcliffe. See also *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 510, PC; *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 274, [1944] 1 All ER 678 at 683, HL, per Lord Wright; *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 at 8, CA, per Bingham LJ.

7 *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 275, [1944] 1 All ER 678 at 683, HL, per Lord Wright; *Baxter Fell & Co Ltd v Galbraith and Grant Ltd* (1941) 70 Ll L Rep 142 at 157 per Atkinson J; *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 509, PC; and see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 186-187, [1941] 2 All ER 165 at 186-187, HL, per Lord Wright.

8 *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166, [1951] 2 All ER 617, HL.



9 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 723, [1956] 2 All ER 145 at 155, HL, per Lord Reid, at 729 and 160 per Lord Radcliffe, and at 735 and 162 per Lord Somervell; *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632 at 667, [1950] 1 All ER 208 at 229, CA, per Asquith LJ; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL; *The Eugenia* [1964] 2 QB 226, [1964] 1 All ER 161, CA; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL; *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724, [1981] 2 All ER 1030, HL; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854, [1983] 1 All ER 34, HL.

10 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 721-722, [1956] 2 All ER 145 at 153-154, HL, per Lord Reid.

11 *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 at 124, [1961] 2 All ER 179 at 189, HL, per Lord Radcliffe; cited with approval in *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724 at 752, [1981] 2 All ER 1030 at 1047, HL, per Lord Roskill.

12 *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724 at 752-753, [1981] 2 All ER 1030 at 1047, HL, per Lord Roskill.

13 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 693, [1981] 1 All ER 161 at 170, HL, per Lord Wilberforce.

## UPDATE

### 898 Juristic basis

NOTE 3--*Wj Tatem*, cited, distinguished in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd, The Sea Angel* [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 237).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/899. Fault of party: self-induced frustration.

### **899. Fault of party: self-induced frustration.**

The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party<sup>1</sup>; that is, the event which a party relies upon as frustrating his contract must not be self-induced<sup>2</sup>.

The defence of frustration can therefore be defeated by proof of fault, and the burden of proof of fault lies upon the party alleging it<sup>3</sup>. Deliberate choice either not to perform or to put performance out of one's power will certainly be fault within this rule<sup>4</sup>; but it does not follow that in all contracts any act of negligence will deprive a party of the protection of the doctrine of frustration<sup>5</sup>, nor even that a deliberate act will necessarily do so<sup>6</sup>. A state trading enterprise, although subject to its government's direction and control and a party to governmental legislation which rendered performance of a contract to which it was a party illegal, was not precluded from relying on frustration as a defence, since it had a separate legal existence<sup>7</sup>.

Self-induced frustration will generally amount to a breach of contract by the party bringing about the event<sup>8</sup>. If that breach is particularly calamitous, it may bring the contract to an end automatically, because the substratum of the contract has disappeared<sup>9</sup>. This may be termed a frustrating breach<sup>10</sup>. More often, that breach will simply give the innocent party the usual right to elect after breach whether or not to bring the contract to an end<sup>11</sup>.

1 *Maritime National Fish Ltd v Ocean Trawlers* [1935] AC 524, PC; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 725, 736, [1968] 3 All ER 513 at 523-533, CA.

2 *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 452, HL, per Lord Sumner. Examples of self-induced frustration include: the election of a party to allocate fishing licences to his other trawlers, leaving no licence to operate the chartered trawler (*Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524, PC); such delay as amounts to mutual abandonment of a contract (*Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854, [1983] 1 All ER 34, HL); where a carrier could perform a contract of carriage by either of his two barges, after the loss of one barge the carrier chose to use the other barge for other work (*J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1, CA; and see note 5 infra). If it is the existence of the right to allocate that prevents application of the doctrine of frustration, this may cause a dilemma for the party with the choice where he has already contracted elsewhere the use of his other facilities. It may therefore indicate the advisability in such circumstances of including an express power to prorate (ie to distribute proportionately) in the force majeure clause (as to which see para 906 post).

3 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, [1941] 2 All ER 165, HL; *Bremer Handelsgesellschaft v Westzucker GmbH (No 3)* [1989] 1 Lloyd's Rep 582, CA. If A proves a prima facie frustrating event, to avoid frustration B must prove that the event was induced by A (*Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* supra), but B cannot escape frustration just by showing that A caused the event: see note 6 infra.

4 See *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524, PC; *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1, CA; and note 2 supra; cf *Barber v Crickett* [1958] NZLR 1057 at 1059, obiter per Cleary J; *Harcourt v Craddock* [1954] OR 308 at 317, [1954] 3 DLR 155 at 161, Ont CA, per Roach JA; and see *William Cory & Son Ltd v London Corp* [1951] 2 KB 476 [1951] 2 All ER 85, CA.

5 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 166, 167, 179, 195, 205, [1941] 2 All ER 165 at 173, 182, 193, 199, 200, HL. But see *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1, CA (contract not frustrated because negligence did not constitute a supervening event).

6 *FC Shepherd & Co Ltd v Jerrom* [1987] QB 301, [1986] 3 All ER 589, CA (employee imprisoned for affray; held not to be self-induced frustration of employment).

7 *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA, The Playa Larga and Marble Islands* [1983] 2 Lloyd's Rep 171, CA. See also *C Czarnikow Ltd v Centrala Handlu Zagranicznego 'Rolimpex'* [1979] AC 351, [1978] 2 All ER 1043, HL. As to export and import licences see para 908 post.

8 See para 786 ante.

9 *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA.

10 See paras 989, 1002 post.

11 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL; and see para 1002 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/900. Ambit of doctrine of frustration: application to particular contracts.

### **900. Ambit of doctrine of frustration: application to particular contracts.**

The doctrine of frustration applies in general to all types of contracts<sup>1</sup> and, inter alia, to the following: personal contracts<sup>2</sup>; building contracts<sup>3</sup>; charterparties<sup>4</sup>, including time charters frustrated by government requisition<sup>5</sup> or act of state<sup>6</sup>; contracts for the carriage of goods by sea<sup>7</sup>; contracts for the sale of goods, whether avoided by statute<sup>8</sup> or otherwise<sup>9</sup>; the hire-purchase of goods<sup>10</sup>; and perhaps even leases and sales of land<sup>11</sup>.

1 It may be questioned whether a contract can ever be frustrated (except by reason of illegality) because a promise therein to pay money becomes difficult to perform. In *King v Michael Faraday & Partners Ltd* [1939] 2 KB 753, [1939] 2 All ER 478 that doctrine was applied to a contract to pay an annual sum out of future personal earnings, but the case is better supported by the alternative ground of decision, that it is against public policy to allow a promisor to assign all his means of support. Cf *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, CA.

2 See eg *Unger v Preston Corpn* [1942] 1 All ER 200 (contract of employment); and see para 903 post.

3 See *Appleby v Myers* (1867) LR 2 CP 651 (contract to install machinery in a building for a fixed sum; but building destroyed by accidental fire before work completed). See also *Federal Steam Navigation Co Ltd v Dixon & Co Ltd* (1919) 64 Sol Jo 67, HL (shipbuilding contract held to have ceased to be operative owing to character and duration of government restrictions imposed); *Woodfield Steam Shipping Co Ltd v JL Thompson & Sons Ltd* (1919) 36 TLR 43, CA (similar case); *Innholders' Co v Wainwright* (1917) 33 TLR 356 (building contract held to be suspended during continuance of prohibition of building operations); *Metropolitan Water Board v Dick, Kerr & Co* [1918] AC 119, HL (express condition in building contract that plaintiffs' engineer might extend time for performance, held not to apply where contract was determined by action of ministry under defence legislation requiring the contractor to cease work); *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, [1956] 2 All ER 145, HL (inadequate supplies of labour rendering contract more onerous did not frustrate contract). Frustration of a building contract may occur even though that contract contains a clause providing that delay will merely suspend a contract: *Sir Lindsay Parkinson & Co Ltd v Comrs of Works and Public Buildings* [1949] 2 KB 632 at 665, [1950] 1 All ER 208 at 228, CA, per Asquith LJ, citing *Metropolitan Water Board v Dick, Kerr & Co* supra. See further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

4 See *Lloyd Royal Belge SA v Stathatos* (1917) 34 TLR 70, CA; *Pacific Phosphate Co Ltd v Empire Transport Co Ltd* (1920) 36 TLR 750 (contract to supply ships, with suspension clause in event of war; held: the change of circumstances was so great that doctrine of frustration applied); *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Médulla, Paris* (1923) 92 LJB 455, HL (forward speculative charterparties consisting of separate adventures; held: performance of contract was not made impossible by war, though certain shipments were dispensed with by consent during war, and there was no frustration); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* [1942] AC 154, [1941] 2 All ER 165, HL (explosion); *EB Aaby's Rederi AS v Lep Transport Ltd* (1948) 81 Ll L Rep 465; *Blane Steamships Ltd v Minister of Transport* [1951] 2 KB 965, CA (stranding); *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724, [1981] 2 All ER 1030, HL (voyage charterparty frustrated by dock strike). See also *The Washington Trader* [1972] 1 Lloyd's Rep 463, USA district court; and CARRIAGE AND CARRIERS. There was held to be no frustration in the following cases: *Thiis v Byers* (1876) 1 QBD 244; *Budgett & Co Binnington & Co* [1891] 1 QB 35; *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, CA (delay in making ship seaworthy not so great as to amount to frustration); and see CARRIAGE AND CARRIERS.

5 See *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, HL (one year time charter; requisition and detention of ship held to have destroyed the identity of chartered service and entitled owner to treat charter as at an end); *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497, PC (ten month charterparty frustrated). But see *Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, HL (five year time charter of steamship subsequently requisitioned by government; held not frustrated); *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146, [1958] 1 All ER 787 (30 month time charter, of which 17 months already expired; held requisition did not frustrate). See also *Heilgers & Co v Cambrian Steam Navigation Co Ltd* (1917) 34 TLR 72, CA (requisition of ship by Admiralty at higher rate than that fixed by existing time charter; held: doctrine of frustration applied, and charterer was not entitled to benefit of difference between the two rates);

*Countess of Warwick Steamship Co v Nickel SA, Anglo-Northern Trading Co v Emlyn Jones and Williams* [1918] 1 KB 372, CA (charterer held not liable for hire under time charter after the date of requisition by Admiralty).

6 See *Dahl v Nelson, Donkin & Co* (1881) 6 App Cas 38, HL (permission for ship to enter docks refused); *Scottish Navigation Co Ltd v WA Souter & Co, Admiral Shipping Co Ltd v Weidner, Hopkins & Co* [1917] 1 KB 222, CA; *The Penelope* [1928] P 180 (time charter held frustrated, though labour difficulties were foreseen, owing to unforeseen total impossibility of export of coal over long period); *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132, [1938] 3 All ER 135 (seizure of ship by Spanish Nationalists held to amount to frustration); *Court Line Ltd v Dant and Russell Inc* [1939] 3 All ER 314 (boom across river during hostilities between Chinese and Japanese held to frustrate contract; duration of impossibility to be judged by probability and not subsequent certainty); *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes, The Evia (No 2)* [1983] 1 AC 736, sub nom *Kodros Shipping Corp v Empresa Cubana de Fletes, The Evia* [1982] 3 All ER 350, HL (18 month charterparty frustrated by outbreak of 1980 Iran-Iraq war whilst ship in war zone).

7 *Associated Portland Cement Manufacturers (1900) Ltd v William Cory & Son Ltd* (1915) 31 TLR 442 (contract by shipowners to provide ships for six years necessary to carry plaintiffs' cement from the Thames to Rosyth; held: the parties had not impliedly stipulated for continuance of peace and the shipowners were not released from their contract by the requisition of their ships, restrictions on voyages and the dangers of navigation caused by outbreak of war); and see CARRIAGE AND CARRIERS. However, the 1956 closure of the Suez Canal did not generally have such an effect: see *Tsakiroglou & Co Ltd v Noble Thorl* [1962] AC 93, [1961] 2 All ER 179, HL; *Ocean Tramp Tankers Corp v V/O Sovfracht, The Eugenia* [1964] 2 QB 226, [1964] 1 All ER 161, CA (no frustration; but there might have been if the goods had been perishable, or the contract contained a definite date for delivery, or a shortage of shipping (see at 243 and 168, obiter per Donovan LJ)); *Palmco Shipping Inc v Continental Ore Corp, The Captain George K* [1970] 2 Lloyd's Rep 21 (no frustration).

8 See eg the Sale of Goods Act 1979 s 7; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 55, 146.

9 See *Nickoll and Knight v Ashton, Edridge & Co* [1901] 2 KB 126, CA (agreement to sell goods to be shipped by a specified ship, later stranded); *Re Shipton, Anderson & Co and Harrison Bros & Co's Arbitration* [1915] 3 KB 676 (sale of goods requisitioned by Crown before delivery and before property had passed to buyer; held: performance of the contract had become impossible, and sellers were not liable for damages for non-delivery); *Dale Steamship Co Ltd v Northern Steamship Co Ltd* (1918) 34 TLR 271, CA (contract for purchase of ship afterwards requisitioned by Admiralty while being built); *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 2 KB 467, CA (contract for supply of timber, the sources of seller's intended supply of which were closed by outbreak of war; held: contract had not been dissolved, and defendants were liable in damages for non-delivery); *Re Comptoir Commercial Anversois and Power Son & Co* [1920] 1 KB 868, CA (condition that sellers in New York should be able to sell draft exchange bills held not to be implied in a contract for the sale of wheat); *Re Badische Co, Re Bayer Co* [1921] 2 Ch 331 (frustration of contract for unascertained goods owing to outbreak of war); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL (place of delivery occupied by enemy); *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, [1944] 1 All ER 678, HL (trading in timber frustrated by imposition of government control); *Lewis Emmanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep 629 (contract for sale of goods cif not frustrated owing to seller's inability to obtain shipping space); *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL; overruling *Carapanayoti & Co Ltd v ET Green Ltd* [1959] 1 QB 131, [1958] 3 All ER 115 (closing of Suez Canal did not frustrate cif contract); *HR & S Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834 (sale of estimated crop of barley to be grown; but poor harvest). It will rarely be possible to make out frustration of a contract for the sale of unascertained goods except, eg where all supply comes from one country and war breaks out with that country. The particular rules of risk in contracts for the sale of goods will in many cases prevent the application of the doctrine of frustration: see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 142 et seq.

10 *Shepherd v Ready Mixed Concrete (London) Ltd* (1968) 112 Sol Jo 518 (death of hirer under hire-purchase agreement).

11 See para 901 post.

## UPDATE

### 900 Ambit of doctrine of frustration: application to particular contracts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/901. Leases and sales of land.

### 901. Leases and sales of land.

The early view of the common law was that a lease of land could not be frustrated because it created an estate in land which was indestructible<sup>1</sup>. Accordingly, in a number of cases the courts supported this view and went on to hold that a specific lease was not frustrated by the particular event which occurred<sup>2</sup>, as where the event interfered with, or temporarily interrupted, a lessee's occupation or enjoyment of the demised premises<sup>3</sup>. However, this view was not applied to a mere contractual licence to occupy land because it created no interest in land<sup>4</sup>; nor to a mere agreement to create a lease<sup>5</sup>.

More recently, the courts have begun to concede that, in appropriate circumstances, a lease of land may be capable of being frustrated<sup>6</sup> (for example by government expropriation<sup>7</sup>). Events which it has been judicially suggested might frustrate a lease include the following: legislation which permanently prohibited building on the site<sup>8</sup>, or perhaps its use for the demised purpose<sup>9</sup>; or a convulsion of nature which might 'swallow up' the property, or bury it permanently under the sea<sup>10</sup>; or the total destruction of an upper floor flat by fire or earthquake<sup>11</sup>; or the destruction or serious damage by fire of demised premises<sup>12</sup>. Where a lease is frustrated, it has been said that the lease would be automatically discharged on the happening of the frustrating event<sup>13</sup>.

In cases of contracts for the sale of land the doctrine may operate very occasionally, but does not normally do so<sup>14</sup>. It has been held that a sale of land was not frustrated by the making of a compulsory purchase order<sup>15</sup>; nor by the listing of a building as one of architectural or historical interest under planning legislation<sup>16</sup>.

1 See *Paradine v Jane* (1647) Aleyn 26; and para 897 note 4 ante. It would follow that leases of goods could be frustrated (eg charterparties of ships and hire-purchases of goods: see para 900 ante).

2 *Redmond v Dainton* [1920] 2 KB 256; *Matthey v Curling* [1922] 2 AC 180, HL; *Denman v Brise* [1949] 1 KB 22, [1948] 2 All ER 141, CA; *Youngmin v Heath* [1974] 1 All ER 461, [1974] 1 WLR 135, CA.

3 *London and Northern Estates Co v Schlesinger* [1916] 1 KB 20 (tenant prohibited from residing by Aliens Restriction Order); *Whitehall Court Ltd v Ettlinger* [1920] 1 KB 680 (flat requisitioned); *Matthey v Curling* [1922] 2 AC 180, HL (requisition of house and destruction by fire); *Swift v Macbean* [1942] 1 KB 375, [1942] 1 All ER 126 (requisition of furnished house which was let for period of war); *Pelepah Valley (Johore) Rubber Estates Ltd v Sungei Besi Mines Ltd* (1944) 170 LT 338 (mining sub-lease; territory subsequently occupied by enemy); *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL (99 year building lease; restrictions placed on building during 1939-45 war; no frustration); *Cusack-Smith v London Corp'n* [1956] 1 WLR 1368; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL (ten year lease of warehouse; temporary street closure order by council expected to last nearly two years on the only access road; held no frustration).

See also *Williams v Mercer* [1940] 3 All ER 292, CA (licence to erect illuminated signs; emergency restrictions on lighting not within term entitling licensee to terminate agreement if required by any authority to alter or amend sign); and see the cases as to leases cited in para 892 note 2 ante. As to war damage see para 892 note 2 ante. As to the construction of covenants in leases and the determination of leases see generally LANDLORD AND TENANT.

It seemed, however, that particular covenants in a lease might be discharged by frustration: *Baily v De Crespigny* (1869) LR 4 QB 180 (lessor's covenant not to build near demised premises; held discharged by compulsory acquisition of lessor's land); *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* supra at 233-234 and at 259, HL, per Lord Russell of Killowen.

4 *Taylor v Caldwell* (1863) 3 B & S 826; and see para 897 note 5 ante.

5 *Rom Securities Ltd v Rogers (Holdings) Ltd* (1967) 205 Estates Gazette 427, obiter per Goff J; *Re Dennis Commercial Properties Ltd v Westmount Life Insurance Co* [1969] 2 OR 850 (Ont) (affd without reasons [1970] 1 OR 698n, Ont CA); cf *Lobb v Vasey Housing Auxiliary (War Widows Guild)* [1963] VR 239 (Vict). In *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, [1944] 1 All ER 678, HL, part of the contract was an agreement for a lease and it was held that the whole contract was frustrated, though no argument was raised on leases. However, the case was an appeal from Scotland and it seems that in Scots law a lease may be frustrated: *Tay Salmon Fisheries Co v Speedie* 1929 SC 593.

6 See *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 at 228-231, 233-234, 241, 244-245, [1945] 1 All ER 252 at 255-257, 258, 263-265, HL, where Lord Russell of Killowen and Lord Goddard were of opinion that the doctrine had no application to a lease, while Viscount Simon LC and Lord Wright thought that it might apply in rare and exceptional instances. In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, the majority of the House of Lords agreed (obiter) with Viscount Simon and Lord Wright in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* supra, but that the circumstances where it would do so were exceedingly rare (at 688-690 and 166-167, 168 per Lord Hailsham LC; at 694-695, 697 and 171, 173 per Lord Wilberforce; at 701-702, 705-706 and at 176-177, 179 per Lord Simon; and at 714, 716, 717-718 and 186, 187, 188 per Lord Roskill; Lord Russell dubitante at 709 and 182, supporting the views of Lords Russell and Goddard in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* supra.

7 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, [1982] 1 All ER 925, HL.

8 *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 at 229, 241, [1945] 1 All ER 252 at 256, 262-263, HL; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 690, 694, 705, [1981] 1 All ER 161 at 167-168, 170-171, 178, HL.

9 'If there was one principal use contemplated by the lessee, known to the lessor, and one that played a large part in fixing the rental value, a governmental prohibition or prevention of that use has been held to discharge the lessee from his duty to pay the rent. It is otherwise if other substantial uses, permitted by the lease and in the contemplation of the parties, remains possible to the lessee': *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 702, [1981] 1 All ER 161 at 177, HL, per Lord Simon.

10 *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 at 229, [1945] 1 All ER 252 at 256, HL, per Lord Simon; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 691 [1981] 1 All ER 161 at 168, HL, per Lord Hailsham LC, at 700-701 and 175-176 per Lord Simon, and at 709 and 182 per Lord Russell.

11 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 690, [1981] 1 All ER 161 at 168, HL, per Lord Hailsham of St Marylebone LC.

12 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 701, [1981] 1 All ER 161 at 176, HL, per Lord Simon and at 713 and 185 per Lord Roskill.

13 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 702, [1981] 1 All ER 161 at 177, HL, per Lord Simon.

14 *Universal Corpn v Five Ways Properties Ltd* [1979] 1 All ER 552, CA (purchaser's deposit detained in Nigeria by change in Nigerian exchange controls; held no frustration); *Victoria Wood Development Corpn Inc v Ondrey* (1978) 22 OR (2d) 1, (Ont CA) (land purchased for building to knowledge of vendor. After conveyance, legislation prohibited such development; held no frustration). But see *Wong Lai Ying v Chinachem Investment Co* (1979) 13 BLR 81, PC (sale of lease to build block of flats; landslip prevented completion within time stipulated in building permit; held frustrated).

15 *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch 627, [1952] 1 All ER 853; cf *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, [1944] 1 All ER 678, HL (option as part of frustrated trading contract). The destruction of a house by fire after contract but before conveyance does not discharge the purchaser: *Paine v Meller* (1801) 6 Ves 349; and see further SALE OF LAND.

16 *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1976] 3 All ER 509, [1977] 1 WLR 164, CA.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/902. Causes of frustration.

## 902. Causes of frustration.

Frustration may arise from a multitude of causes, but it is useful to group the cases according to certain common types of frustrating event, as follows<sup>1</sup>:

- 224 (1) physical destruction of the subject matter of the contract: this was one of the earliest instances of the emergence of the doctrine of frustration<sup>2</sup>;
- 225 (2) cancellation of an expected event: where an expected event is the foundation of the contract (as where the parties agree to provide and take seats to view a procession) the cancellation of that event so as to remove completely that foundation will as a general rule<sup>3</sup> frustrate the contract<sup>4</sup>;
- 226 (3) delay: frustration very commonly arises through delay, attributable to the fault of neither party<sup>5</sup>, of such a character that the fulfilment of the contract, in the only way or ways contemplated and practicable, is so inordinately postponed that the delayed fulfilment will involve something commercially or fundamentally different from that contemplated in the contract<sup>6</sup>. Whilst delay in the performance of a contract caused, for instance, by war may be so great as to frustrate the contract<sup>7</sup>, there is no irrebuttable presumption that a war will last so long as to defeat the commercial adventure. Accordingly, a declaration of war does not, unless the contract would involve trading with the enemy<sup>8</sup>, of itself frustrate the contract<sup>9</sup>. Indeed, the relationship of delay to frustration often gives rise to something of a contradiction: whether a contract is frustrated by delay is often a question of degree<sup>10</sup>; and, whilst it has often been said that businessmen are entitled to know where they stand and must not be required to wait upon events<sup>11</sup>, whether or not the delay is such as to bring about frustration must be determined on the basis of all the evidence of what has occurred and what is likely to occur<sup>12</sup>;
- 227 (4) subsequent legal changes: another familiar example of frustration is to be found where impossibility of performance has arisen through subsequent changes in the law. Where performance of the contract has been rendered impossible by an Act of Parliament passed after the contract was made, then the promisor is excused from performing his promise (unless it appears that he intended to bind himself with reference to the future state of the law), for the presumption is that the parties intend to contract with reference to the law as existing at the time when the contract is made<sup>13</sup>. This rule has, for example, been applied to contracts of employment<sup>14</sup>;
- 228 (5) acts of state: the same principle<sup>15</sup> applies where performance is rendered legally impossible by delegated legislation or by the exercise of powers under an Act or delegated legislation<sup>16</sup>, or through an act of state, such as a declaration of war<sup>17</sup> or ban on exports<sup>18</sup>. Even though no specific order is made, where on the outbreak of war the continued performance of the contract would involve intercourse with, or benefit to, the enemy or detriment to the interests of the United Kingdom, the effect at common law is generally to abrogate any subsisting right to further performance of the contract<sup>19</sup>; but accrued rights, for instance to the payment of a liquidated sum of money, are not destroyed, merely suspended for the duration of the war<sup>20</sup>;
- 229 (6) subsequent changes of foreign law or acts of state: where a contract governed by English law requires an act to be done in a foreign country, it is, in the absence of very special circumstances, discharged if the act becomes illegal by the

law of that country<sup>21</sup>. Similarly, a contract may be frustrated where subsequent act of a foreign state renders performance impossible<sup>22</sup>;  
 230 (7) death or incapacity: when personal considerations are of the foundation of the contract the death or incapacity of a party will generally discharge the contract<sup>23</sup>.

1 Parol evidence is admissible to prove the subject matter of a written contract: *Krell v Henry* [1903] 2 KB 740 at 754, CA. As to the parol evidence rule see paras 622, 690-700 ante.

2 *Taylor v Caldwell* (1863) 3 B & S 826 (contract for the letting of a music hall for the purpose of giving concerts discharged on accidental burning of hall); *Appleby v Myers* (1867) LR 2 CP 651, Ex Ch (contract for installation and maintenance of machinery discharged by destruction of premises and machinery); *Howell v Coupland* (1876) 1 QBD 258, CA (sale of 200 tons of potatoes to be grown on seller's land during particular season discharged by failure of the crop); and see the Sale of Goods Act 1979 s 7; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 55. Cf also *Kennedy v Thomassen* [1929] 1 Ch 426 (death of annuitant before completion of release by deed of rights under annuity; and see para 903 note 3 post).

3 But see *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683, CA (agreement that steamship should be at disposal of defendant both for purpose of viewing naval review and for cruising round fleet not discharged by cancellation of review).

4 *Krell v Henry* [1903] 2 KB 740, CA (hire of premises to see coronation procession which was subsequently cancelled; contract discharged); *Blakeley v Muller & Co* [1903] 2 KB 760n; *Chandler v Webster* [1904] 1 KB 493, CA; and see *Berthoud v Schweder & Co* (1915) 31 TLR 404 (agreement by stockbroker to pay half commission on all business introduced, subject to specified minimum; discharged by closure of Stock Exchange); cf *Griffith v Brymer* (1903) 19 TLR 434; and *Clark v Lindsay* (1903) 88 LT 198, where the decision to cancel had already been taken at the time of contracting: see para 894 note 4 ante. See also the remarks in relation to *Krell v Henry* supra of Lord Wright in *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 529, PC.

5 Accordingly, long delays in arbitration caused by the inactivity of both sides cannot frustrate a contract because self-induced (see para 899 ante): *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854, [1983] 1 All ER 34, HL (following *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909, [1981] 1 All ER 289, HL; but on this point not following *André et Cie SA v Marine Transocean Ltd, The Splendid Sun* [1981] 1 QB 694, [1981] 2 All ER 993, CA; *Neptune Maritime Co of Monrovia v Koninklijke Bunge BV, The Argonaut* [1982] 2 Lloyd's Rep 214, CA); and see further the Arbitration Act 1996 s 41(3); and ARBITRATION vol 2 (2008) PARA 1250. As to such inactivity as repudiation or abandonment see paras 998, 1009 post.

6 *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125, Ex Ch; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, HL; *Scottish Navigation Co Ltd v WA Souter & Co* [1917] 1 KB 222, CA; *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL; *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL; *The Angelia* [1973] 2 All ER 144, [1973] 1 WLR 210. See also *Duncanson v Scottish County Investment Co Ltd* 1915 SC 1106.

7 *Metropolitan Water Board v Dick, Kerr & Co* [1918] AC 119, HL; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL; *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, [1944] 1 All ER 678, HL.

This may be so even though the contract provides for suspension of the contract in that event: see para 900 ante.

8 See note 17 infra.

9 *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 2 All ER 658, [1983] 1 WLR 1469. See also *Andrew Millar & Co Ltd v Taylor & Co* [1916] 1 KB 402, CA.

10 On this issue, an appellate court should be reluctant to interfere with the first instance decision: *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes, The Evia (No 2)* [1983] 1 AC 736 at 767-768, sub nom *Kodros Shipping Corp v Empresa Cubana de Fletes, The Evia* [1982] 3 All ER 350 at 368, HL.

11 'Commercial men must be entitled to act on reasonable commercial probabilities at the time they are called upon to make up their minds': *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 706, [1981] 1 All ER 161 at 180, HL, per Lord Simon.

12 *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724 at 752, [1981] 2 All ER 1030 at 1047, HL, per Lord Roskill.

13 *Brewster v Kitchell* (1698) 1 Salk 198; *Davis v Cary* (1850) 15 QB 418 (condition in a bond as to rendering accounts becoming impossible owing to repeal of statute); *Wynn v Shropshire Union Rlys and Canal Co* (1850) 5 Exch 420 (covenants in deed subsequently rendered unlawful of performance); *Brown v London Corp'n* (1862) 13 CBNS 828 (condition in a bond to pay annuity from tolls rendered impossible by statutory transfer of control of tolls); *Baily v De Crespigny* (1869) LR 4 QB 180 (covenant not to build in lease; under a subsequent statute, land compulsorily purchased by a railway company which then built on land; held no breach of covenant); *Newby v Sharpe* (1878) 8 ChD 39, CA (covenant to keep premises in proper condition for the storage of cartridges; held not to import a warranty of the legality of so storing them); *Newington Local Board v Cottingham Local Board* (1879) 12 ChD 725 (agreement not to permit other sewers to discharge into a particular sewer; held overruled by provisions of a subsequent Act giving right so to discharge); *Grimsdick v Sweetman* [1909] 2 KB 740 (extinction of a beerhouse licence held not to put an end to a lease of the premises, with a covenant to use the premises as a beerhouse and not to use them otherwise); *H-- v H--* [1938] 3 All ER 415 (separation deed not avoided by change in law of divorce); *Bromarin AB v IMD Investments Ltd* [1998] STC 244 (change of tax law).

14 *Reilly v R* [1934] AC 176, PC (abolition of office by statute discharged contract of employment); *Marshall v Glanvill* [1917] 2 KB 87; *Studholme v South Western Gas Board* [1954] 1 All ER 462, [1954] 1 WLR 313 (service agreement with gas company; remuneration based on capital of company; vesting of company's property, rights and liabilities in Gas Board; basis for calculation of remuneration destroyed).

15 Whilst supervening illegality is normally treated as an instance of frustration, it seems that the principles are not exactly the same. Thus whilst the doctrine of frustration gives way to an express contractual provision (eg force majeure clauses (see para 906 post)), an express provision cannot exclude the principles of supervening illegality where this would be against public policy: *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260, HL; and see para 847 ante.

16 *Re Shipton Anderson & Co and Harrison Bros & Co* [1915] 3 KB 676 (sale of goods requisitioned before performance of contract); *Wycombe Borough Electric Light and Power Co Ltd v Chipping Wycombe Corp'n* (1917) 33 TLR 489 (agreement to supply electricity; construction of force majeure clause); *Metropolitan Water Board v Dick, Kerr & Co* [1917] 2 KB 1, CA (affd [1918] AC 119, HL) (building contract suspended by order of the ministry; held incapable of performance and commercially impracticable); *Egham and Staines Electricity Co Ltd v Egham UDC* [1944] 1 All ER 107, HL (agreement to supply electricity; construction of force majeure clause); *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 271, 280, 282, [1944] 1 All ER 678 at 681, 686, 687, HL (doubting *Leiston Gas Co v Leiston-cum-Sizewell Urban Council* [1916] 2 KB 428, CA); *White and Carter Ltd v Carbis Bay Garage Ltd* [1941] 2 All ER 633, CA (contract to display advertisements frustrated by Defence Regulations); cf *Williams v Mercer* [1940] 3 All ER 292, CA (agreement as to neon sign not affected by wartime lighting restrictions); cf *Mertens v Home Freeholds Co* [1921] 2 KB 526, CA (deliberate delay by builder, with subsequent stoppage of work by ministry: builder not permitted to take advantage of such intervention as a frustration of the contract); *Produce Brokers Co v Weiss & Co* (1918) 87 LJKB 472 (sellers already in default when government restrictions imposed); *Federal Steam Navigation Co Ltd v Dixon & Co Ltd* (1919) 64 Sol Jo 67, HL (government restrictions on building of merchant vessels); *Woodfield Steam Shipping Co Ltd v JL Thompson & Sons Ltd* (1919) 36 TLR 43, CA; *Akt Olivebank v Dansk Svoivlsyre Fabrik* [1919] 2 KB 162, CA (government restriction on carriage to named port); *Seville and United Kingdom Carrying Co Ltd v Mann, George & Co* (1916) 32 TLR 522, CA (undertaking to pay extra freight on cargo (the greater part of which had, unknown to parties, been requisitioned) in consideration of vessel's being taken to a certain port, held binding only as regarded so much cargo as was taken to port); *Claddagh Steamship Co v Steven & Co* 1919 SC (HL) 132 (government requisition of ship); *Seng Djit Hin v Nagurdas Purshotumdas & Co* [1923] AC 444, PC (government requisition of shipping); *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497, PC; *Slipper v Tottenham and Hampstead Junction Rly Co* (1867) LR 4 Eq 112 (proviso against assignment without licence; subsequent exercise of compulsory powers); *Mills v East London Union* (1872) LR 8 CP 79 (compulsory purchase of tenant's interest; tenant held liable for breach of covenant to repair up to date of assignment); *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274, CA (lessee who let right of exhibiting advertisement not discharged by compulsory acquisition of premises); *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch 627, [1952] 1 All ER 853 (contract for sale of land held not to be frustrated by the making of a compulsory purchase order); *Re RS Newman Ltd, Raphael's Claim* [1916] 2 Ch 309, CA (option to take up shares in company, in regard to which compulsory winding up order was made before exercise of option; held: there was an implied condition that the company was in existence when the application for the shares was made). But see *Islwyn Borough Council and Gwent County Council v Newport Borough Council* [1994] ELR 141, CA (presumption of irrevocability of contract by local authority, despite change of political control).

17 *Melville v De Wolf* (1855) 4 E & B 844 (seaman sent home under statutory authority; employment terminated); *Reid v Hoskins* (1856) 6 E & B 953, Ex Ch; *Avery v Bowden* (1856) 6 E & B 953 (war broke out after unaccepted repudiation); *Esposito v Bowden* (1857) 7 E & B 763. See also *Hadley v Clarke* (1799) 8 Term Rep 259 (embargo on shipping 'until further Order in Council'; contract only suspended); *Kleinwort, Sons & Co v Ungarische Baumwolle Industrie Akt* [1939] 2 KB 678, [1939] 3 All ER 38, CA (foreign exchange restriction); *Andrew Millar & Co Ltd v Taylor & Co* [1916] 1 KB 402, CA (sale for export, but before delivery an embargo was imposed; held: the sellers were not entitled to say that the contract was at an end, but should have waited a

reasonable time before repudiating, to see if they could have carried out the contract, which they could have done as the embargo was only temporary); *Edward Grey & Co v Tolme and Rungé* (1915) 31 TLR 551 (held, further performance of the contract was illegal as involving trading with the enemy); *Jager v Tolme and Rungé and London Produce Clearing House Ltd* [1916] 1 KB 939, CA; *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co, Theodor Schneider & Co v Burgett and Newsam* [1916] 1 KB 495, CA; *Zinc Corp Ltd v Hirsch* [1916] 1 KB 541, CA; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497, CA (permitted export prices in excess of contract prices; sellers not excused); *Cantiere Navale Triestina v Handelsvertretung der Russ Soz Fod Soviet Republik Naphtha Export* [1925] 2 KB 172, CA (ship ordered to leave port but subsequently permitted to load; held: not such illegality as to excuse the performance of the contract); *International Sea Tankers Inc v Hemisphere Shipping Co Ltd (No 2)* [1983] 1 Lloyd's Rep 400 (ship trapped by war in Shatt-al-Arab; held charterparty indirectly frustrated); *Finelvet AG v Vinava Shipping Co, The Chrysalis* [1983] 2 All ER 658, [1983] 1 WLR 1469 (similar case).

The contract does not need to be with an enemy alien; it is enough that the contract would bring advantage to the enemy: *Re Badische Co Ltd* [1921] 2 Ch 331 at 373-378; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL (war).

18 *E Hulton & Co Ltd v Chadwick and Taylor Ltd* (1919) 122 LT 66 (government restriction on imports); *McMaster & Co v Cox McEuen & Co* 1921 SC (HL) 24 (refusal of export permit; buyer not discharged as contract not conditional upon any particular market). As to contracts made subject to a licence see para 908 post.

19 Whether or not the other party is an enemy alien: see *Esposito v Bowden* (1857) 7 E & B 763; *Robson v Premier Oil and Pipe Line Co Ltd* [1915] 2 Ch 124, CA; *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260, HL (see para 847 ante); *Naylor Benzon & Co Ltd v Krainische Industrie Gesellschaft* [1918] 2 KB 486, CA (see also para 842 ante); *Schering Ltd v Stockholms Enskilda Bank Aktiebolag* [1946] AC 219, [1946] 1 All ER 36, HL; *Arab Bank Ltd v Barclays Bank* [1954] AC 495, [1954] 2 All ER 226, HL; *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch 323, [1956] 1 All ER 129; cf *Bevan v Bevan* [1955] 2 QB 227, [1955] 2 All ER 206 (executory contract providing for separation and maintenance not abrogated by fact that payee resides in enemy territory, though payments should be made to custodian of enemy property during hostilities). As to this common law principle, and for legislation relating to custody and disposal of enemy property see further WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) paras 585-586. Where a contract is abrogated by the outbreak of war, any claim by a party who is an alien enemy to recover back money paid under the contract on the principles applying to frustrated contracts (see para 912 et seq post) must be disallowed for the like reasons as prevent the performance of the contract: *Arab Bank Ltd v Barclays Bank* [1953] 2 QB 527 at 560, 561, [1953] 2 All ER 263 at 278, CA, per Singleton LJ, at 570 and at 284 per Jenkins LJ, at 574 and at 286 per Morris LJ; affd on other grounds [1954] AC 495, [1954] 2 All ER 226, HL. For the circumstances in which an alien enemy can sue see *Porter v Freudenberg* [1915] 1 KB 857, CA; and WAR AND ARMED CONFLICT.

20 *Hugh Stevenson & Sons Ltd v Aktiengesellschaft fur Cartonnagen-Industrie* [1918] AC 239, HL (partnership dissolved by one partner becoming an enemy alien; but enemy partner entitled to share of profits made thereafter with aid of his share of capital); *Schering Ltd v Stockholms Enskilda Bank Aktiebolag* [1946] AC 219, [1946] 1 All ER 36, HL (contract executed); *Bevan v Bevan* [1955] 2 QB 227, [1955] 2 All ER 206 (separation agreement remains in force after wife becomes an enemy alien; but, during war, payments should be made to Custodian of Enemy Property). As to the custodianship of enemy property see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) paras 585-586.

21 *Foster v Driscoll* [1929] 1 KB 470, CA; *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 (where the earlier cases are considered); *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301, [1957] 3 All ER 286, HL. See also *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL; *Zivnostenska Banka National Corp v Frankman* [1950] AC 57, [1949] 2 All ER 671, HL; *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] AC 588, [1956] 1 All ER 639, HL (refusal by Portuguese government to grant export licence for performance of an English contract); *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA, The Playa Larga and The Marble Islands* [1983] 2 Lloyd's Rep 171, CA (Cuban government freezing the contract property); *Nile Co for the Export of Agricultural Crops v H & JM Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep 555 (Egyptian government regulation requiring payment by irrevocable letter of credit); and see further the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980) art 8 as set out in the Contracts (Applicable Law) Act 1990 s 2(4), Sch 1; and CONFLICT OF LAWS vol 8(3) (Reissue) paras 359-361; CARRIAGE AND CARRIERS. Where the foreign law merely excuses performance, the contract is not frustrated: *Jacobs v Crédit Lyonnais* (1884) 12 QBD 589, CA; *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 2 KB 467, CA. Where the foreign illegality prevented performance during only part of the contract period, the contract is not frustrated: *Ross T Smyth & Co (Liverpool) Ltd v WN Lindsay (Leith) Ltd* [1953] 2 All ER 1064, [1953] 1 WLR 1280.

For the effect of an act of state by a foreign government see note 17 supra. For the construction of clauses in a contract relating to foreign export restrictions and prohibitions see para 908 post.

22 *Smith, Coney and Barrett v Becker, Gray & Co* [1916] 2 Ch 86, CA (German embargo on export of sugar held not to terminate the rights of the parties to a contract of sale, there being no prohibition against a notional transfer in the warehouse from seller to buyer); *Kursell v Timber Operators and Contractors* [1927] 1 KB 298, CA (confiscation by foreign government); *First Russian Insurance Co v London and Lancashire Insurance Co* [1928]

Ch 922 (contracts of reinsurance between insurance companies; held: Russian confiscatory decree did not prevent Russian company from discharging its obligations).

A number of cases arose as a result of the US government ban on the export of soya bean meal: see eg *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep 416, CA; *Tradax Export SA v Carapelli SpA* [1977] 2 Lloyd's Rep 157 (effect on circle contract); *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL (sellers able to rely on prohibition and force majeure force clauses (see para 906 post) as non-delivery caused by ban not purportedly defective force majeure notice); *Continental Grain Export Corp of New York v STM Grain Ltd* [1979] 2 Lloyd's Rep 460 (string contract); *Warinco AG v Fritz Mauthner* [1978] 1 Lloyd's Rep 151, CA (seller not protected when suspension of export licence caused him to default in delivery); *Provimi Hellas AE v Warinco AG* [1978] 1 Lloyd's Rep 373, CA; *André & Cie SA v Ets Michel Blanc & Fils* [1979] 2 Lloyd's Rep 427, CA (seller not protected after misrepresenting effect of US ban); *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1981] 1 Lloyd's Rep 292, CA (demand for string proof); *Tradax Export SA v Rocco Giuseppe & Figli* [1981] 1 Lloyd's Rep 353 (circle case); *Cook Industries Inc v Meunerie Liégeois SA* [1981] 1 Lloyd's Rep 359 (sellers unable to rely on prohibition and force majeure clauses as not able to trace string back to relevant supplier and show that shipment was impossible); *André & Cie SA v Tradax Export SA* [1981] 2 Lloyd's Rep 352, CA (Appeal Committee of the House of Lords refused appeal [1983] CLY 2869); *Congimex Companhia Geral SARL v Tradax Export SA* [1983] 1 Lloyd's Rep 250, CA (no frustration).

The expropriation of oil concession by Libyan government operated as a frustrating event: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, [1982] 1 All ER 925, HL; and paras 913, 915, 917 post.

23 See para 903 post.

## UPDATE

### 902 Causes of frustration

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/903. Death or incapacity of party.

### 903. Death or incapacity of party.

Generally speaking, the death of a contracting party will have no effect upon either the contract or rights already accrued under it<sup>1</sup>. However, when personal considerations are of the foundation of the contract, prima facie the death<sup>2</sup> of either party puts an end to the relationship and the contract is discharged, as in cases of principal and agent<sup>3</sup>, or employer and employee<sup>4</sup>; but this is not necessarily the case where the employer is a partnership, one of whose partners dies<sup>5</sup>.

A contract for personal services which can be performed only by the promisor himself will be treated as discharged if, without default on his part<sup>6</sup>, he becomes physically incapable of performing the contract, as where an employee is physically incapacitated by illness<sup>7</sup> or imprisonment<sup>8</sup> or call-up for military service<sup>9</sup>; or is incapable in a business sense of doing so<sup>10</sup>.

1 *Re Worthington, ex p Pathé Frères* [1914] 2 KB 299, CA (underwriting agreement held not a personal contract); *Warner Engineering Co Ltd v Brennan* (1913) 30 TLR 191; *Re Witwicki* (1979) 101 DLR (3d) 430, Man CA; and see para 1078 post.

2 At common law, this would not affect a right of action vested under such a contract before death: *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311; and see para 1078 post. However, the position may be altered when the Law Reform (Frustrated Contracts) Act 1943 is applicable: see para 916 post.

3 *Friend v Young* [1897] 2 Ch 421 (death of agent); *Hotel and General Advertising Co v Wickenden and Stene* (1899) 15 TLR 302, CA (contract to hang tariff frame in hotel discharged by death of proprietor); cf *General Publicity Services Ltd v Best's Brewery Co Ltd* [1951] WN 507; *Harvey v Tivoli, Manchester Ltd* (1907) 23 TLR 592, DC (death of one member of troupe of music hall artistes); *Graves v Cohen* (1929) 46 TLR 121 (death of jockey; contract to ride horses said to be dissolved by death of either party); *Kennedy v Thomassen* [1929] 1 Ch 426 (death of annuitant before completion of release by deed of rights under annuity); and see further generally AGENCY vol 1 (2008) PARAS 188-189.

4 *Farrow v Wilson* (1869) LR 4 CP 744 (death of servant); *Davison v Reeves* (1892) 8 TLR 391; and see EMPLOYMENT vol 40 (2009) PARA 689.

5 As to the effect of death of partner on contract of service with a firm see *Phillips v Alhambra Palace Co* [1901] 1 KB 59 (music hall owned by firm; death of one partner held not to discharge contracts for performances); *Tasker v Shepherd* (1861) 6 H & N 575 (contract of service terminated by death of partner); and see PARTNERSHIP. Quære as to the effect of the death of the employer in a large business organisation, for it may be argued that his personality is not an important factor.

6 It seems that in the context of personal contracts, 'default' may have to be somewhat narrowly defined: *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 166, 167, [1941] 2 All ER 165 at 173, HL, obiter per Viscount Simon LC.

7 *Boast v Firth* (1868) LR 4 CP 1 (apprentice prevented from serving by permanent illness); *Robinson v Davison* (1871) LR 6 Exch 269 (pianist incapacitated through illness from performing on specified date); *Poussard v Spiers and Pond* (1876) 1 QBD 410 (illness of opera singer brought contract to an end; but cf *Bettini v Gye* (1876) 1 QBD 183); *Hart v AR Marshall & Sons (Bulwell) Ltd* [1978] 2 All ER 413, [1977] 1 WLR 1067, EAT (employee's indefinite absence through illness frustrated contract of employment).

See also *Marshall v Harland and Wolff Ltd* [1972] 2 All ER 715, [1972] 1 WLR 899, NIRC, where it is suggested that length of previous service is a relevant factor in considering whether a contract of employment is frustrated by prolonged sickness. See further note 10 infra; and EMPLOYMENT vol 40 (2009) PARA 686.

8 *Unger v Preston Corp Ltd* [1942] 1 All ER 200 (employment as a medical officer frustrated by prolonged internment); *Horlock v Beal* [1916] 1 AC 486, HL (internment of seaman); *Hare v Murphy Bros Ltd* [1974] 3 All ER 940, CA (12 month prison sentence rendered continuation of contract of employment impossible); *FC Shepherd & Co Ltd v Jerrom* [1987] QB 301, [1986] 3 All ER 589, CA (indeterminate prison sentence between six

months and two years on apprentice brought apprenticeship to an end). Cf *Nordman v Rayner and Sturges* (1916) 33 TLR 87 (contract of agency not dissolved by temporary internment); *Schostall v Johnson* (1919) 36 TLR 75 (contract of agency not dissolved by agent becoming alien enemy, though not interned); *Hangkam Kwintong Woo v Liu Lan Fong (alias Liu Ah Lan)* [1951] AC 707, [1951] 2 All ER 567, PC (contract of agency not dissolved by agent being in enemy occupied territory); see AGENCY vol 1 (2008) PARA 187.

9 *Marshall v Glanvill* [1917] 2 KB 87 (employment determined by liability to compulsory military service); *Morgan v Manser* [1948] 1 KB 184, [1948] 2 All ER 666 (artiste called up for military service).

10 Where the employee is incapacitated by illness the test is whether the illness is such as to put an end, in the business sense, to the engagement: *Storey v Fulham Steel Works Co* (1907) 24 TLR 89, CA; see also *Simeon v Watson* (1877) 46 LJQB 679 (held good defence to action by schoolmaster for removing a pupil without giving notice or paying an equivalent in money, according to the contract, that the removal was a temporary one due to the pupil's illness); *Condor v Barron Knights Ltd* [1966] 1 WLR 87 (contract by drummer to play seven nights a week frustrated by illness rendering him capable of playing only three or four nights a week); cf *Mount v Oldham Corpn* [1973] QB 309, [1973] 1 All ER 26, CA (absence of headmaster from school did not frustrate contract with education authority).

## **UPDATE**

### **903 Death or incapacity of party**

NOTE 9--For '[1948] 2 All ER 666' read '[1947] 2 All ER 666'.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/904. Contract becoming onerous.

#### **904. Contract becoming onerous.**

Whatever the alleged source of frustration, a contract is not discharged under the doctrine of subsequent impossibility and frustration<sup>1</sup> merely because it turns out to be difficult to perform or onerous<sup>2</sup>. Thus the parties will not generally be released from their bargain on account of ordinary risks of business, such as rises or falls in prices<sup>3</sup>, depreciations of currency or unexpected obstacles to the execution of the contract<sup>4</sup>. In particular, a party's insolvency or inability to get finance will not discharge him, unless, of course, the parties have agreed otherwise<sup>5</sup>.

Further, where the change of circumstances is insufficiently serious to frustrate a contract, the party unsuccessfully claiming frustration remains liable to perform his promises<sup>6</sup>.

<sup>1</sup> See para 897 ante.

<sup>2</sup> 'It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play': *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 729, [1956] 2 All ER 145 at 160, HL, per Lord Radcliffe; applied in *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1976] 3 All ER 509, [1977] 1 WLR 164, CA.

<sup>3</sup> *Greenway Bros Ltd v SF Jones & Co* (1915) 32 TLR 184 (rise in prices caused by outbreak of war held not to constitute impossibility); *Blythe & Co v Richards, Turpin & Co* (1916) 85 LJB 1425 (similar case); *Twentsche Overseas Trading Co Ltd v Uganda Sugar Factory Ltd* (1944) 114 LJPC 25 (outbreak of war; sources of supply other than in hostile territory); *EB Aaby's Rederi AS v Lep Transport Ltd* (1948) 81 Ll L Rep 465 (goods destroyed in dockside fire, rendering voyage unprofitable for charterers, though they could have got another cargo; contract held not discharged); *Exportelisa SA v Guiseppe and Figli Soc Coll* [1978] 1 Lloyd's Rep 433, CA (Argentinean government action rendered it more expensive for supplier to obtain goods).

<sup>4</sup> *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166, [1951] 2 All ER 617, HL (contract for supply of newsreels to cinemas made more difficult by wartime restrictions on use of film); and see *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 2 KB 467, CA (outbreak of war prevented seller from obtaining goods from intended source); *Charon (Finchley) Ltd v Singer Sewing Machine Co Ltd* (1968) 112 Sol Jo 536 (building work had to be repeated after damage by vandals); *Kawasaki Steel Corp v Sardoil SpA, The Zuiho Maru* [1977] 2 Lloyd's Rep 552 (charterers unable to provide full cargo due to government rationing); *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1976] 3 All ER 509, [1977] 1 WLR 164, CA (agreement to sell building subsequently listed as being of architectural or historic interest); *Chaucer Estates Ltd v Fairclough Homes Ltd* [1991] EGCS 65, CA (highway authority required builder to maintain road); and see the cases concerning the closure of the Suez Canal cited in para 900 ante. See also *Roberts v Independent Publishers Ltd* [1974] 1 NZLR 459, CA (consideration for option was right to acquire shares in a public company; not frustrated when that company taken private); *Benevides v Minister of Public Works and Agriculture* [1980-84] LRC (Comm) 277, Bermuda CA (demolition contract made easier when building destroyed by fire).

<sup>5</sup> *Francis v Cowcliffe Ltd* (1977) 33 P & CR 368, DC (landlord unable to perform his covenant because insolvent); cf *Hangkam Kwintong Woo v Liu Lan Fong (alias Liu Ah Lan)* [1951] AC 707, [1951] 2 All ER 567, PC (mortgage debt paid off in 'occupation currency'; subsequent Ordinance declaring such payments to be of no effect). As to force majeure clauses see para 906 post.

<sup>6</sup> *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 3)* [1989] 1 Lloyd's Rep 582, CA (burden of proof on party claiming frustration); and see para 899 ante.



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### 905. Matters within scope of contemplation of parties.

The simplest case of frustration is where the event interfering with performance is totally unexpected and such as the parties could not reasonably have foreseen, but the doctrine is wider in scope than that<sup>1</sup>. It is clear that prima facie a contract may be discharged by frustration even though the parties foresaw or ought to have foreseen the frustrating event<sup>2</sup>. However, where, by reason of special knowledge, one party foresees the possibility of the event and conceals this from the other, the party with the special knowledge will not be discharged<sup>3</sup>. In each case, however, it is a question of construction whether the failure of the parties to make specific provision for a foreseen event means that each party should take the risk of that event rendering performance impossible<sup>4</sup>, or whether, in the absence of any such intention, the doctrine of frustration should apply to discharge the contract<sup>5</sup>.

Where the parties have made provision for the foreseen event the doctrine of frustration will as a rule have no application<sup>6</sup>, except in cases of frustration by supervening illegality<sup>7</sup>; but in certain cases the parties may not be taken to have envisaged the extent of the circumstances which in fact interfered with performance, and in such cases the doctrine of frustration, and not the express provision, will govern their position<sup>8</sup>.

<sup>1</sup> See para 902 ante.

<sup>2</sup> *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132, [1938] 3 All ER 135; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 455-456, HL, per Lord Sumner; *Jennings and Chapman Ltd v Woodman, Matthews & Co* [1952] 2 TLR 409 at 413, CA, obiter per Somervell LJ; *Société Franco-Tunisienne d'Armement v Sidemar SpA* [1961] 2 QB 278, [1960] 2 All ER 529; *The Eugenia* [1964] 2 QB 226 at 239, [1964] 1 All ER 161 at 166, CA, per Lord Denning MR; *Nile Co for the Export of Agricultural Crops v H & JM Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep 555 at 582; *Adelfamar SA v Silos E Mangimi Martini SpA, The Adelfa* [1988] 2 Lloyd's Rep 466 at 471.

<sup>3</sup> *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274, CA.

<sup>4</sup> *McAlpine Humberoak Ltd v McDermott International Inc* (1992) 58 BLR 1, CA (sub-contractor to bear extra costs associated with revised drawings, which were expressly covered by contract). Where the parties foresee a very high risk of the event it may be easy to infer that they did not intend the contract to be discharged.

<sup>5</sup> *Chandler Bros Ltd v Boswell* [1936] 3 All ER 179, CA (sub-contract prepared by parties with principal contract before them but making no provision for possible result of action which might be taken under principal contract); *D/S A/S Gulnes v Imperial Chemical Industries Ltd, The Gulnes* [1938] 1 All ER 24 (marginal note in charterparty failed to cover ship receiving a direct hit before loading); *The Eugenia* [1964] 2 QB 226 at 239, [1964] 1 All ER 161 at 166, CA, per Lord Denning MR; but see the observations of Lord Wright in *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 529, PC.

<sup>6</sup> *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 163, [1941] 2 All ER 165 at 171, HL; *Wates Ltd v GLC* (1983) 25 BLR 1, CA (presence of price escalation clause made court reluctant to infer frustration by reason of increase in price). As to force majeure clauses see para 906 post. Such clauses are likely to be construed narrowly: *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 455, HL. Very exceptionally, there may be implied a provision excluding frustration: *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Médulla, Paris* (1923) 39 TLR 316, HL.

<sup>7</sup> *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260, HL (contract abrogated by outbreak of war notwithstanding clause providing for suspension). As to frustration by subsequent illegality see further para 902 ante. As to illegality in general see para 836 et seq ante.

An express provision may oust the doctrine of frustration: *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL; *Johnson Matthey Bankers Ltd v State Trading Corp of India* [1984] 1 Lloyd's Rep 427.

8     *Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL (express term providing for reasonable extension held not to refer to prolonged delay occasioned by World War II). See also *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125; *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119, HL; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, HL; *Pacific Phosphate Co Ltd v Empire Transport Co Ltd* (1920) 36 TLR 750; *The Penelope* [1928] P 180; *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes, The Evia (No 2)* [1983] 1 AC 736, sub nom *Kodros Shipping Corp v Empresa Cubana de Fletes, The Evia* [1982] 3 All ER 350, HL [1982] 3 All ER 350, HL.

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## 906. Force majeure clauses.

Many contracts expressly provide for performance to be excused if rendered impossible by unavoidable cause such as act of God<sup>1</sup>, the Queen's enemies<sup>2</sup>, act of state<sup>3</sup>, force majeure<sup>4</sup> or vis major<sup>5</sup>. Stipulations to that effect are effective<sup>6</sup>, provided that they are not uncertain in their terms<sup>7</sup> and that there is compliance with any notice requirement<sup>8</sup>. A force majeure clause (as such a stipulation is usually called) must be construed in each case with due regard to the nature and general terms of the contract and, in particular, with regard to the precise words of the clause<sup>9</sup>. Such a clause on its proper construction may allow the court to take account of the promisor's obligations under other contracts despite the fact that, as a rule, it is no excuse that contracts with third parties prevent the fulfilment of the contract in question<sup>10</sup>. When the contract excuses a party from delays due to unavoidable causes, he may be outside the protection of that provision if he fails, before making the contract, to inquire whether such unavoidable causes exist and to inform the other party<sup>11</sup>. The party may not be protected by the clause where a force majeure event does not in fact render performance impossible<sup>12</sup>.

1 As to what constitutes an 'act of God' see para 907 post. As to the exemption of a common carrier for liability for injury arising from an act of God see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 16-17.

2 *Embiricos v Sydney Reid & Co* [1914] 3 KB 45. Queen's enemies would apparently include rebels: *Secretary of State for War v Midland Great Western Rly Co of Ireland* [1923] 2 IR 102; but cf *R v Sheares* (1798) 27 State Tr 255 at 388, 391 (a trial for treason). As to the exemption of a common carrier from liability for injury arising from the Queen's enemies see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 16-17. As to the statutory modification of the liability of a bailee in respect of war damage see BAILMENT vol 3(1) (2005 Reissue) para 92. As to the statutory modification of the rights of landlords and tenants of war damaged property see para 892 note 2 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) paras 479, 644-645.

3 *C Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex* [1979] AC 351, [1978] 2 All ER 1043, HL (defaulting party was a state corporation in a socialist state with which the UK was at peace; performance was prevented by an act of the central organs of state). See also *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep 560 (contract subject to licence); and para 908 post).

4 For the meaning of 'force majeure' see the cases cited in note 9 infra.

5 The expression 'vis major' includes the Queen's enemies as well as act of God: see *Simmons v Norton* (1831) 7 Bing 640 at 649 per Tindal CJ. 'UCE' (unforeseen circumstances excepted) means that such circumstances must have arisen as to render the performance of the contract impossible; a vendor who was prevented from getting goods from his intended source of supply would not be protected if he could obtain the goods elsewhere: *George Wills & Sons Ltd v RS Cunningham, Son & Co Ltd* [1924] 2 KB 220; *J Leavey & Co Ltd v GH Hirst & Co Ltd* [1944] KB 24, [1943] 2 All ER 581, CA.

6 *Egham and Staines Electricity Co Ltd v Egham UDC* [1944] 1 All ER 107, HL (force majeure clause applied in contracts to supply electricity for street lighting when war-time lighting restrictions prevented full performance). See also *Nicolene Ltd v Simmonds* [1953] 1 QB 543, [1953] 1 All ER 822, CA; and para 673 note 2 ante.

7 *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 All ER 94, [1953] 1 WLR 280 ('usual force majeure clauses to apply' held void for uncertainty).

8 *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL. See also *Toepfer v Cremer* [1975] 2 Lloyd's Rep 118, CA; *P J Van Der Zijden Wildhandel NV v Tucker and Cross Ltd* [1975] 2 Lloyd's Rep 240; *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep 416, CA; *V Berg & Sons Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 499, CA; *Toepfer v Schwarze* [1977] 2 Lloyd's Rep 380; *Bunge AG v Fuga AG* [1980] 2 Lloyd's Rep 513; *André & Cie SA v Tradax Export SA* [1983] 1 Lloyd's Rep 254, CA.

9 *Lebeaupin v R Crispin & Co* [1920] 2 KB 714 at 718-721. See also *Matsoukis v Priestman & Co* [1915] 1 KB 681 (force majeure held to have a more extensive meaning than act of God and to include a strike and breakdown in machinery); *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495, HL (shortage of supply owing to war within clause); *Peter Dixon & Sons Ltd v Henderson, Craig & Co* [1919] 2 KB 778, CA (war-time difficulty with shipping within clause); *Re An Arbitration Between The Podar Trading Co Ltd, Bombay and Francois Tagher, Barcelona* [1949] 2 KB 277, [1949] 2 All ER 62, DC (construction of force majeure in accordance with contract); *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 1 All ER 981 (revsd on other grounds [1952] 2 All ER 497, CA) (inability owing to export restrictions to obtain goods at contract price not force majeure); *Bunten and Lancaster Ltd v Wilts Quality Products (London) Ltd* [1951] 2 Lloyd's Rep 30 (failure of crop not force majeure when other supplies available); *Fairclough Dodd and Jones Ltd v JH Vantol Ltd* [1956] 3 All ER 921, [1957] 1 WLR 136, HL (London Oil and Tallow Trades Association form of contract; cl 11B); *Walton (Grain and Shipping) Ltd v British Italian Trading Co Ltd* [1959] 1 Lloyd's Rep 223 (refusal of export licence within the terms of force majeure clause); *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1962] 1 QB 42, [1961] 2 All ER 577, CA (revsd on other points [1963] AC 691, [1963] 1 All ER 545, HL); *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93, [1961] 2 All ER 179, HL (fact that usual route was not open to shipping not force majeure as alternative route was available); *European Grain and Shipping Ltd v JH Rayner & Co Ltd* [1970] 2 Lloyd's Rep 239 (Cattle Food Trade Association contract form no 6, cl 19); *Sociedad Iberica de Molturacion SA v Tradax Export SA* [1978] 2 Lloyd's Rep 545 (strike); *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565, CA (special condition imposing absolute obligation on sellers to obtain export certificate was not inconsistent with, and did not override, force majeure clause). Cf *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106 at 123, [1969] 1 All ER 522, CA (where a third party, defendant to an action for inducing breach of contract, was seeking to rely on a force majeure clause); *Intertradax SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep 509, CA (shortage of supplies due to breakdown of machinery, and delivery delays due to inadequacies of railway, both commonplace events, not force majeure); *Sonat Offshore SA v Ameerada Hess Development and Texaco (Britain)* [1988] 1 Lloyd's Rep 145, CA (explosion caused by payee's negligence not within force majeure clause). As to construction of exclusion clauses see generally para 803 et seq ante. As to the construction of clauses relating to excepted risks in shipping contracts see CARRIAGE AND CARRIERS.

10 *Pool Shipping Co Ltd v London Coal Co of Gibraltar Ltd* [1939] 2 All ER 432; cf *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] AC 684, [1960] 2 All ER 100, PC; *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA, The Marine Star* [1993] 1 Lloyd's Rep 329, CA.

11 *The Angelia* [1973] 2 All ER 144 at 159, [1973] 1 WLR 210 at 227, obiter per Kerr J.

12 *Warinco AG v Fritz Mauthner* [1978] 1 Lloyd's Rep 151, CA (no force majeure where contract allowed shipment from any Mediterranean port and only Greece prohibited export); *Huilerie l'Abeille v Société des Huileries du Niger, The Kastellon* [1978] 2 Lloyd's Rep 203; *Transcanada Pipelines Ltd v Northern and Central Gas Corp Ltd* (1983) 146 DLR (3d) 293, Ont CA. The burden of proof is on the party alleging force majeure: *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep 57.

## UPDATE

### 906 Force majeure clauses

NOTE 9--See *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), [2010] All ER (D) 111 (Jan) (unexpected downturn in world financial markets not force majeure).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/907. What constitutes an act of God.

### 907. What constitutes an act of God.

In the legal sense of the term, an act of God may be defined<sup>1</sup> as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against<sup>2</sup>; or, more accurately, as an accident<sup>3</sup> (1) due to natural causes, directly and exclusively without human intervention<sup>4</sup>; and (2) which could not by any amount of ability have been foreseen, or, if foreseen, could not by any amount of human care and skill have been resisted<sup>5</sup>. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably have been anticipated<sup>6</sup>. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when, in other words, it does not imply any law from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God<sup>7</sup>. It must, however, be something overwhelming, and not merely an ordinary accidental circumstance<sup>8</sup>.

The following, amongst other occurrences, have been said to be acts of God: a violent storm at sea<sup>9</sup>, an extraordinarily high tide<sup>10</sup>, an unprecedented rainfall<sup>11</sup>, an extraordinary flood<sup>12</sup>, an earthquake<sup>13</sup>, fire caused by lightning<sup>14</sup>, an extraordinary frost<sup>15</sup>, an extraordinary snowfall<sup>16</sup>, death<sup>17</sup>, lunacy<sup>18</sup>, and (in contracts of personal services) illness<sup>19</sup>.

On the other hand, it has been held that the following were not acts of God: gnawing by rats of a hole in a pipe of a ship, through which the sea water came in and damaged the cargo<sup>20</sup>, a fog<sup>21</sup>, an ordinary fall of snow<sup>22</sup> or bad weather<sup>23</sup>, and fire not caused by lightning<sup>24</sup>.

1 It should be noted that many of the authorities concern not the interpretation of this expression as an express term of the contract, but (1) the exemption of act of God given to common carriers (see *CARRIAGE AND CARRIERS* vol 7 (2008) PARA 16); or (2) act of God as a defence to certain forms of liability in tort (see *TORT*).

2 *Pandorf v Hamilton* (1886) 17 QBD 670, CA (on appeal sub nom *Hamilton Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, HL). The term does 'not mean the act of God in the ecclesiastical and biblical sense, according to which everything is said to be an act of God': *Pandorf v Hamilton* supra at 675 per Lord Esher MR. An act of God is distinct from 'inevitable accident': see *Trent and Mersey Navigation Co v Wood* (1785) 4 Doug KB 287 at 290 per Lord Mansfield CJ; *Forward v Pittard* (1785) 1 Term Rep 27 at 33.

3 *J and J Makin Ltd v London and North Eastern Rly Co* [1943] KB 467, [1943] 1 All ER 645, CA.

4 The act of God is 'something in opposition to the act of man': *Forward v Pittard* (1785) 1 Term Rep 27 at 33 per Lord Mansfield CJ. 'The act of God is natural necessity, as wind and storms, which arise from natural causes': *Trent and Mersey Navigation Co v Wood* (1785) 4 Doug KB 287 at 290 per Lord Mansfield CJ.

5 *Nugent v Smith* (1876) 1 CPD 423 at 434, CA.

6 *Nitro-Phosphate and Odam's Chemical Manure Co v London and St Katharine Docks Co* (1878) 9 ChD 503 at 515-516, CA, per Fry J. See also *Dixon v Metropolitan Board of Works* (1881) 7 QBD 418 at 421-422; *Baldwin's Ltd v Halifax Corp'n* (1916) 85 LJB 1769.

7 *Oakley v Portsmouth and Ryde Steam Packet Co* (1856) 11 Exch 618 at 623.

8 *Oakley v Portsmouth and Ryde Steam Packet Co* (1856) 11 Exch 618 at 623.

9 *Nugent v Smith* (1876) 1 CPD 423 at 434, CA; *River Wear Comrs v Adamson* (1877) 2 App Cas 743, HL.

10 *Nichols v Marsland* (1876) 2 Ex D 1, CA; affg (1875) LR 10 Exch 255.

- 11 *Nichols v Marsland* (1876) 2 Ex D 1, CA; *Thomas v Birmingham Canal Co* (1879) 49 LJQB 851. It must be such a rainfall as could not reasonably have been anticipated, and not merely an unusual rainfall such as the defendant ought to have been prepared for: *Dixon v Metropolitan Board of Works* (1881) 7 QBD 418.
- 12 *Nichols v Marsland* (1876) 2 Ex D 1, CA. An extraordinary flood or tide means such a flood as no reasonable person would anticipate: *R v Essex Sewers Comrs* (1885) 14 QBD 561 at 581, CA, per Brett MR; affd sub nom *Fobbing Sewers Comrs v R* (1886) 11 App Cas 449, HL.
- 13 *Nichols v Marsland* (1876) 2 Ex D 1 at 5, CA.
- 14 *Keighley's Case* (1609) 10 Co Rep 139a at 140.
- 15 *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781.
- 16 *Briddon v Great Northern Rly Co* (1858) 28 LJ Ex 51.
- 17 *R v Leicestershire Justices* (1850) 15 QB 88; *Pell v Linnell* (1868) LR 3 CP 441 at 443 (death of party to action).
- 18 *Re Bird, Bird v Cross* (1894) 8 R 326.
- 19 *Cuckson v Stones* (1858) 1 E & E 248 at 256; *K-- v Raschen* (1878) 38 LT 38 at 40 per Cleasby B.
- 20 *Pandorf v Hamilton* (1886) 17 QBD 670 at 675, 684, CA. On appeal sub nom *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, the House of Lords reversed the Court of Appeal on the ground that the injury arose from the 'dangers and accidents of the sea', but the point as to act of God was not raised on the appeal. See *Dale v Hall* (1750) 1 Wils 281; cf *Carstairs v Taylor* (1871) LR 6 Exch 217.
- 21 *Liver Alkali Co v Johnson* (1874) LR 9 Exch 338.
- 22 *Fenwick v Schmalz* (1868) LR 3 CP 313 at 316.
- 23 *V Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 499, CA.
- 24 *Forward v Pittard* (1785) 1 Term Rep 27 at 33. See also, as to acts of God generally, CARRIAGE AND CARRIERS vol 7 (2008) PARAS 16-17, 265 et seq; NEGLIGENCE; SHIPPING AND MARITIME LAW; TORT.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(i) The Doctrine of Subsequent Impossibility and Frustration/908. Contracts made subject to licence.

### 908. Contracts made subject to licence.

A contract for the sale and shipment of goods to or from abroad will commonly contain a clause whereby either the contract is made subject to the obtaining of an import or export licence, or its fulfilment is made subject to any prohibition on export<sup>1</sup>. It may be the express or implied duty of one party to obtain any licence<sup>2</sup>; and, if the party under such a duty wishes to rely on the clause, he must show that he took all reasonable steps to obtain the licence or that a licence would not in any event have been granted<sup>3</sup>. Where the contract contains no term making it conditional in the manner above-mentioned, it is a question of construction whether the party under the duty to obtain the licence has undertaken absolutely to do so, or only to use his best endeavours to that end<sup>4</sup>. Where such a contract provides for cancellation in the event of prohibition of export and during the contractual period for shipment the sellers receive notice that such a prohibition is to be imposed, the sellers, if they wish to rely on the clause, must show that they used their best endeavours to ship the goods in the period before the prohibition came into force<sup>5</sup>.

Liability under repairing covenants in leases is not excused or postponed by the difficulty or impossibility of obtaining licences<sup>6</sup>. On an agreement for the sale of a lease, it is the duty of the vendor to procure any necessary licence from the lessor<sup>7</sup>.

1 Distinguish where the contract could be performed outside the area of the export ban: *Warinco AG v Fritz Mauthner* [1978] 1 Lloyd's Rep 151, CA. For the effect of such a condition on the formation of the contract see para 670 ante. For the formation of international sales contracts under the Uniform Law on the International Sale of Goods see paras 629 note 5, 684 ante.

2 As to import and export licences see para 788 ante.

3 *Windschuegl Ltd v Pickering & Co Ltd* (1950) 84 Ll L Rep 89 (where the duty of obtaining the licence was expressly laid on the sellers); *Société d'Avances Commerciales (London) Ltd v A Besse & Co (London) Ltd* [1952] 1 TLR 644; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497, CA; *Beves & Co Ltd v Farkas* [1953] 1 Lloyd's Rep 103; *Diamond Cutting Works Federation Ltd v Triefus & Co Ltd* [1956] 1 Lloyd's Rep 216; *Kyprianou v Cyprus Textiles Ltd* [1958] 2 Lloyd's Rep 60, CA (sellers under duty to obtain export licence, buyers under duty to co-operate with them to supply information to enable export licence to be obtained); *Denning v Edwardes* [1961] AC 245, PC (Governor's consent necessary; agreement validly entered into before consent obtained; inchoate until consent obtained); *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep 560; and see para 906 ante.

A similar principle applies where after the contract is made dealings are prohibited except under licence: *JW Taylor & Co v Landauer & Co* [1940] 4 All ER 335; *Vidler & Co (London) Ltd v R Silcock & Sons Ltd* [1960] 1 Lloyd's Rep 509. The burden of proof under this head of frustration appears to be the reverse of the general rule in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, [1941] 2 All ER 165, HL (see para 899 ante).

4 *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98, CA; *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565, CA. See further para 788 ante.

5 *Ross T Smyth & Co Ltd (Liverpool) v WN Lindsay Ltd (Leith)* [1953] 2 All ER 1064, [1953] 1 WLR 1280; distinguishing *Re Anglo-Russian Merchant Traders and John Batt & Co (London)* [1917] 2 KB 679, CA (here the prohibition took immediate effect); *Agroexport State Enterprise for Foreign Trade v Compagnie Europeenne de Cereales* [1974] 1 Lloyd's Rep 499. See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 363-365.

6 *Eyre v Johnson* [1946] KB 481, [1946] 1 All ER 719; *Maud v Sandars* [1943] 2 All ER 783; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 458.

7 *Lloyd v Crispe* (1813) 5 Taunt 249; and see LANDLORD AND TENANT vol (1) (2006 Reissue) para 547. See also *Hargreaves Transport Ltd v Lynch* [1969] 1 All ER 455, [1969] 1 WLR 215, CA (purchaser of land to obtain planning permission).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(ii) Effect of Subsequent Impossibility or Frustration/909. Introduction.

## (ii) Effect of Subsequent Impossibility or Frustration

### 909. Introduction.

At common law, frustration does not rescind a contract *ab initio*<sup>1</sup>; instead, upon frustration<sup>2</sup>, a contract is discharged as to the future, releasing both parties from further performance<sup>3</sup>; it is brought to an end automatically, without any act or election of the parties<sup>4</sup>. Even though both parties to a contract are discharged in respect of future performance<sup>5</sup>, an arbitration clause may remain in force to govern matters up to the date of frustration or the issues arising from frustration itself<sup>6</sup>. The time of frustration<sup>7</sup>, the possibility of 'partial frustration'<sup>8</sup> and the effect of frustration both at common law<sup>9</sup> and under statute<sup>10</sup> are all considered in the following paragraphs.

The issues of whether a contract is frustrated and the effect of frustration frequently fall within the scope of an arbitration clause<sup>11</sup>. At the time it happens, the parties may not realise that their contract has been frustrated<sup>12</sup>, in which case services may be rendered and payments made after frustration<sup>13</sup>.

1 As to the distinction between initial impossibility and mistake see para 894 ante. As to rescission *ab initio* see para 986 post.

2 As to whether a contract is frustrated see paras 897-908 ante.

3 *Blakeley v Muller & Co*[1903] 2 KB 760n; *Chandler v Webster*[1904] 1 KB 493, CA; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[1943] AC 32 at 50, [1942] 2 All ER 122 at 130, HL, per Lord Atkin, at 70 and at 140 per Lord Wright; *Compania Naviera General SA v Kerametal Ltd, The Lorna I* [1983] 1 Lloyd's Rep 373, CA.

4 *Hirji Mulji v Cheong Yue Steamship Co Ltd*[1926] AC 497, PC; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd*[1942] AC 154, [1941] 2 All ER 165, HL; *Heyman v Darwins Ltd*[1942] AC 356 at 365, [1942] 1 All ER 337 at 343, HL, obiter per Viscount Simon LC; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1981] 1 WLR 232 at 241, CA, per Lawton LJ (affd without mentioning this point [1983] 2 AC 352, [1982] 1 All ER 925, HL). As to discharge as a result of breach see para 989 et seq post.

5 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd*[1942] AC 154 at 163, [1941] 2 All ER 165 at 171, HL, per Viscount Simon LC; *National Carriers Ltd v Panalpina (Northern) Ltd*[1981] AC 675 at 700, [1981] 1 All ER 161 at 175, HL, per Lord Simon.

6 *Heyman v Darwins Ltd*[1942] AC 356, [1942] 1 All ER 337, HL; *Kruse v Questier & Co Ltd*[1953] 1 QB 669, [1953] 1 All ER 954; and see note 11 infra.

7 See para 910 post.

8 See para 911 post.

9 See para 912 post.

10 See para 913 post.

11 See *Heyman v Darwins Ltd*[1942] AC 356 at 366, [1942] 1 All ER 337 at 343, HL, per Lord Simon, at 383 and 352-353 per Lord Wright, and at 400-401 and 360-361 per Lord Porter; *Kruse v Questier & Co Ltd*[1953] 1 QB 669, [1953] 1 All ER 954; *Government of Gibraltar v Kenney*[1956] 2 QB 410, [1956] 3 All ER 22. The issues are particularly suitable for arbitration: *Pioneer Shipping Ltd v BTP Tioxide Ltd*[1982] AC 724 at 743-744, sub nom *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema*[1981] 2 All ER 1030 at 1039-1040, HL; *Kodros Shipping*

*Corpn of Monrovia v Empresa Cubana de Fletes, The Evia (No 2)*[1983] 1 AC 736, sub nom *Kodros Shipping Corpn v Empresa Cubana de Fletes, The Evia*[1982] 3 All ER 350, HL. See further ARBITRATION.

12 Contra where this is realised and a new contract made between the parties.

13 It will then be a question of whether recompense can be claimed in respect of those post-contract benefits: see RESTITUTION vol 40(1) (2007 Reissue) paras 100-103.

## **UPDATE**

### **909 Introduction**

NOTES--See *Anyanwu v South Bank Student Union (No 2)* (2003) Times, 5 December, EAT (imposition of new constitution on university union by the university, resulted in termination of contracts of employment of the employees of the union, due to impossibility of performance).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(ii) Effect of Subsequent Impossibility or Frustration/910. Time of frustration.

### 910. Time of frustration.

As a general rule, a contract will be automatically discharged by frustration at the time of the frustrating event, since the doctrine does not depend on any act or election by the parties<sup>1</sup>; and it seems that, where the core of the contract is the happening of some future event and the cancellation of that event is announced beforehand, the time of frustration will be the time of the announcement<sup>2</sup>. The court must look at the matter on the basis of the facts known to the parties at the time of the event interfering with the contract and the probabilities as they then appeared, and not in the light of later events which may show that the contract could in fact have been performed<sup>3</sup>.

Whilst a declaration of war may of itself frustrate a contract<sup>4</sup>, it will not necessarily do so unless it involves trading with the enemy<sup>5</sup>, as there is no irrebuttable presumption that the war will last so long as to defeat the commercial adventure of the contract<sup>6</sup>.

1 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 163, [1941] 2 All ER 165 at 171, HL, per Viscount Simon LC. See also para 909 note 4 ante.

2 *Krell v Henry* [1903] 2 KB 740, CA; but cf *Griffith v Brymer* (1903) 19 TLR 434 (event cancelled but announcement not made until after formation of contract; contract held void).

3 *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 454, HL, per Lord Sumner; *Court Line Ltd v Dant and Russell Inc* [1939] 3 All ER 314 (ship delayed by boom placed across river during hostilities; fair inference from facts then known that delay would be indefinite, though boom was in fact removed soon after ship left area); *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88 at 105, [1953] 2 All ER 1086, CA.

4 See para 902 note 17 ante.

5 See eg *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL (contract between UK and Poland frustrated by the German invasion of Poland and the declaration by the UK of war on Germany).

6 *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* [1983] 2 All ER 658, [1983] 1 WLR 1469.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(ii) Effect of Subsequent Impossibility or Frustration/911. Frustration of part, or suspension, of a contractual obligation.

### **911. Frustration of part, or suspension, of a contractual obligation.**

In the case of a contract which is severable<sup>1</sup>, part may be frustrated and part remain in force<sup>2</sup>. Furthermore, supervening events may suspend the obligation to perform a contractual promise without altogether discharging it, so temporary illness may excuse an employee from failure to attend his place of employment without discharging the contract of employment<sup>3</sup>. Again, illegality may excuse performance of a minor obligation without frustrating the entire contract, as where war-time building restrictions may temporarily excuse performance of a covenant to build<sup>4</sup>. Beyond this, it seems doubtful if there is any doctrine of partial frustration<sup>5</sup>; and it has been held that where a party enters into several contracts but later events reduce his supplies he is not excused performance<sup>6</sup>.

1 As to the distinction between entire and severable (or divisible) contracts see para 922 post. As to severability in the context of illegality see para 877 ante. For statutory provisions as to the effect of frustration where a contract is severable see para 916 post.

2 *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 278-280, [1944] 1 All ER 678 at 685-687, HL, obiter per Lord Wright, and at 283-284 and at 688 per Lord Porter (a case where the contract was held not to be severable); *Minnevitich v Café de Paris (Londres) Ltd* [1936] 1 All ER 884. However, it seems that even in an entire contract of sale when it is impossible to deliver part of the goods, the buyer may 'waive' this and call for delivery of the rest: *HR & S Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834; see further SALE OF GOODS AND SUPPLY OF SERVICES.

3 *Boast v Firth* (1868) LR 4 CP 1; and see *Bettini v Gye* (1876) 1 QB 183; *Storey v Fulham Steelworks Co* (1907) 24 TLR 89, CA; and EMPLOYMENT vol 40 (2009) PARA 732.

4 *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL.

5 The cases seem explicable on other grounds: see *Egham and Staines Electricity Co Ltd v Egham UDC* [1944] 1 All ER 107, HL (interpretation of force majeure clause: see para 906 note 6 ante); *HR & S Sainsbury Ltd v Street* [1972] 3 All ER 1127, [1972] 1 WLR 834 (implied condition that farmer should be excused from delivering barley only to the extent that the crop failed); and see SALE OF GOODS AND SUPPLY OF SERVICES.

6 *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1, CA (see para 899 note 2 ante).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(ii) Effect of Subsequent Impossibility or Frustration/912. Losses arising from frustration: effect at common law.

## **912. Losses arising from frustration: effect at common law.**

It was long considered that the legal result of the principle that the contract was discharged by frustration was that losses arising from frustration lay where they fell<sup>1</sup>, so that where under the contract there were sums paid and other sums payable before the frustrating event, it was held that money already paid was irrecoverable and payment of money already due under the contract was enforceable<sup>2</sup>. However, a party who had performed only part of an entire contract<sup>3</sup> could recover nothing, even where he had conferred a benefit on the other party by his partial performance<sup>4</sup>.

Quite apart from the above position under the contract, it was also held that there could be no recovery in restitution on grounds of total failure of consideration. Due to the fact that the contracting party out of pocket had had the benefit of the executory contractual promise up until the moment of frustration<sup>5</sup>, it was considered that there had been no total failure of consideration<sup>6</sup>. However, in 1942 the House of Lords held that money paid under a frustrated contract was recoverable where the consideration had wholly failed<sup>7</sup>. The explanation for this was that, whilst in the law of contract the concept of consideration included not just performance of a promise, but also a promise to perform it<sup>8</sup>, in restitution the concept of consideration referred only to the performance of a promise<sup>9</sup>.

However, the 1942 decision still left the old rule applicable in the case of partial failure of consideration<sup>10</sup>, and did nothing to ameliorate the position of a party required to pay money who had himself incurred expense in relation to the contract<sup>11</sup>. In most, but not all, situations, the common law position has been replaced by the Law Reform (Frustrated Contracts) Act 1943<sup>12</sup>.

1 See eg *Blakeley v Muller & Co* [1903] 2 KB 760n; *Civil Service Co-operative Society v General Steam Navigation Co* [1903] 2 KB 756, CA; and see note 2 *infra*.

2 See *Chandler v Webster* [1904] 1 KB 493, CA, where a room was hired to view the coronation procession, the price being payable immediately. When the procession was cancelled, £100 had been paid on account. It was held that the contract was frustrated (see para 902 note 4 *ante*) thereby releasing the parties from further performance (see para 909 note 3 *ante*), but leaving promises performable before the frustrating event still standing. There was no total failure of consideration: see note 6 *infra*.

3 As to entire contracts see para 922 *post*.

4 See eg *Cutter v Powell* (1795) 6 Term Rep 320; *Appleby v Myers* (1867) LR 2 CP 651, Ex Ch; cf *Government of Gibraltar v Kenney* [1956] 2 QB 410, [1956] 3 All ER 22.

It seems, however, that after a frustrating event a party who takes reasonable steps to protect the interests of the other may be entitled to remuneration on the basis of a restitutionary quantum meruit: *Société Franco-Tunisienne d'Armement v Sidermar SpA* [1961] 2 QB 278, [1960] 2 All ER 529; overruled on another point *The Eugenia* [1964] 2 QB 226, [1964] 1 All ER 161, CA.

5 It follows that there would only be a total failure of consideration if the contract were avoided *ab initio*: see *Branwhite v Worchester Works Finance Ltd* [1969] 1 AC 552, [1968] 3 All ER 104, HL (parties never reached consensus).

6 *Chandler v Webster* [1904] 1 KB 493, CA.

7 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL. Under Scottish law it had already been held that the doctrine of restitution applied: *Cantiare San Rocco SA v Clyde Shipbuilding and Engineering Co* [1924] AC 226, HL.

8 See para 733 ante. As to failure of consideration leading to discharge of a contract see para 992 post.

9 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61, [1942] 2 All ER 122 at 135-136, HL, per Lord Wright. As to total failure of consideration in restitution see RESTITUTION vol 40(1) (2007 Reissue) para 87 et seq.

10 See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 54, [1942] 2 All ER 122 at 132, HL, per Lord Atkin, at 56 and at 133 per Lord Russell of Killowen and at 72 and at 141 per Lord Wright. For cases of partial failure of consideration see *Blakeley v Muller & Co* [1903] 2 KB 760n; *Lumsden v Barton & Co* (1902) 19 TLR 53; and RESTITUTION vol 40(1) (2007 Reissue) para 94.

11 See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 49, [1942] 2 All ER 122 at 129, 130, HL, per Viscount Simon LC, at 55 and at 132 per Lord Atkin, at 72 and at 141 per Lord Wright and at 78 and 144 per Lord Porter.

12 See para 913 post. There remain certain cases outside the statute which continue to be wholly governed by the above common law position: see para 919 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(ii) Effect of Subsequent Impossibility or Frustration/913. Losses arising from frustration: effect by statute.

### **913. Losses arising from frustration: effect by statute.**

The Law Reform (Frustrated Contracts) Act 1943 applies (1) where a contract governed by English law<sup>1</sup> has become<sup>2</sup> impossible of performance or been otherwise frustrated<sup>3</sup>, and the parties have for that reason been discharged from further performance of the contract<sup>4</sup>; (2) to contracts discharged by frustration on or after 1 July 1943, whether made before or after the commencement of the Act<sup>5</sup>; and (3) to contracts to which the Crown is a party<sup>6</sup>.

In respect of contracts (or severable parts of contracts<sup>7</sup>) the common law position<sup>8</sup> is changed (except for limited classes of contracts<sup>9</sup>) by the 1943 Act. Subject to contrary agreement of the parties<sup>10</sup>, that Act permits recovery of money paid upon a contract which has become frustrated even where there has been no total failure of consideration<sup>11</sup>; and it also makes provision where other valuable benefits have been conferred before frustration<sup>12</sup>, special arrangements being made for overhead expenses<sup>13</sup>, insurance moneys<sup>14</sup> and benefits conferred on third parties<sup>15</sup>. Under the ordinary rules<sup>16</sup>, a court may award interest on sums payable under the 1943 Act between the date when the cause of action arose (being the date of frustration<sup>17</sup>) and the date of judgment<sup>18</sup>.

1 A contract governed by English law presumably means a contract which is governed as to its essential validity by English law, because it is of course possible for different aspects of a contract to be governed by different systems of law: see *BP Exploration Co (Libya) v Hunt* [1976] 3 All ER 879, [1976] 1 WLR 788. See generally CONFLICT OF LAWS.

2 The Law Reform (Frustrated Contracts) Act 1943 therefore has no application where the impossibility already exists when the contract is made: see *Griffith v Brymer* (1903) 19 TLR 434 (unknown to the parties, the coronation procession was cancelled before the contract to rent the viewing room was made); and para 894 note 4 ante.

3 The phrase 'impossible of performance or otherwise frustrated', whilst not defined by the Law Reform (Frustrated Contracts) Act 1943, seems wide enough to cover the concept of frustration at common law, including frustration by reason of illegality: see paras 897-908 ante. However, it does not extend to contracts discharged by reason of breach: see *Sumpter v Hedges* [1898] 1 QB 673, CA (contract abandoned by party on his insolvency); and para 989 et seq post.

4 Law Reform (Frustrated Contracts) Act 1943 s 1(1).

5 Ibid s 2(1). The Act received Royal Assent on 5 August 1943. In respect of contracts discharged by frustration before 1 July 1943, the decision of the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL (see para 912 ante) still governs the position.

6 Law Reform (Frustrated Contracts) Act 1943 s 2(2).

7 See *ibid* s 2(4); and para 916 post.

8 See para 912 ante.

9 See the Law Reform (Frustrated Contracts) Act 1943 s 2(5); and para 919 post.

10 See *ibid* s 2(3); and para 917 post.

11 See *ibid* s 1(2); and para 914 post.

12 See *ibid* s 1(3); and para 915 post.

13 See *ibid* s 1(4); and para 914 post.

- 14 See *ibid* s 1(5); and para 918 post.
- 15 See *ibid* s 1(6); and para 915 post.
- 16 See the Law Reform (Miscellaneous Provisions) Act 1934 s 3(1); and DAMAGES.
- 17 See para 910 ante.
- 18 See *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, [1982] 1 All ER 925, HL (BP entitled to interest as from the date when Hunt first became aware of BP's intention to bring a claim against him).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(ii) Effect of Subsequent Impossibility or Frustration/914. Advance payments and sums accrued due before discharge.

#### **914. Advance payments and sums accrued due before discharge.**

Where the Law Reform (Frustrated Contracts) Act 1943 applies<sup>1</sup>, all sums paid to a party before the time of discharge in pursuance of the contract<sup>2</sup> are recoverable from him as money received by him for the use<sup>3</sup> of the party by whom the sums were paid, and all sums payable at the time of discharge cease to be payable<sup>4</sup>.

However, if the party to whom the sums were paid or payable before the time of discharge incurred expenses<sup>5</sup> before the time of the discharge in, or for the purpose of, the performance<sup>6</sup> of the contract, the court<sup>7</sup> may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums paid or payable, up to an amount not exceeding the actual expenses so incurred<sup>8</sup>. In estimating the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the above provisions, include such sum as appears reasonable in respect of overhead expenses and in respect of any work or services performed personally by the party<sup>9</sup>. The court's discretion as to the amount retainable or recoverable under this proviso by the payee is not confined to the issue of whether to bring the expenses into account, but also extends to the proportion of the sums paid or payable which the payee can retain or recover<sup>10</sup>.

1 See para 913 ante.

2 As to the time of discharge see para 910 ante.

3 As to restitutionary claims of this nature see RESTITUTION vol 40(1) (2007 Reissue) paras 100-103.

4 Law Reform (Frustrated Contracts) Act 1943 s 1(2). This provision relieves a party (the payer) from an obligation to pay money, and it grants that relief to the payer, whether the sums are paid or payable: see eg *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226 (contract for concert frustrated when venue declared unsafe; held: promoter could recover advance payments made to musicians). However, the Law Reform (Frustrated Contracts) Act 1943 s 1(2) is limited to obligations to pay sums of money so, after frustration, the parties remain liable to pay damages for non-performance of any other obligation performable before frustration (see para 909 ante). Such sums cannot be brought within s 1(3) (see para 915 post) because they are not a benefit obtained 'before the time of discharge'. Exceptionally, s 1(2) gives a cause of action to the payee (see s 1(2) proviso; and the text to note 8 infra). In relation to sums of money paid or payable, s 1(2) does not take any account of the time value of money (the discounted net cash flow method of accounting) (see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 800 (affd [1982] 1 All ER 925, [1981] 1 WLR 232, CA; and [1983] 2 AC 352, [1982] 1 All ER 925, HL)); but, of course, on ordinary principles interest is payable on judgment debts (see para 913 note 18 ante). The Law Reform (Frustrated Contracts) Act 1943 therefore goes further than the common law in that it allows recovery of money paid even in a case of partial failure of consideration: see eg *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra.

5 See note 9 infra. As to insurance moneys see the Law Reform (Frustrated Contracts) Act 1943 s 1(5); and para 918 post.

6 Though the point is not free from doubt, the wording suggests that mere preparation for future contracts does not fall within this provision; cf *Anglia Television Ltd v Reed* [1972] 1 QB 60, [1971] 3 All ER 690, CA (damages for breach in respect of pre-contract expenditure): see further DAMAGES.

7 'Court' means, in relation to any matter, the court or arbitrator by whom the matter falls to be determined: Law Reform (Frustrated Contracts) Act 1943 s 3(2).

8 Ibid s 1(2) proviso.

9 Ibid s 1(4). Expenses incurred 'for the purposes of' the frustrated contract might include pre-contract expenditure.

10 See *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226 (held that the payer could recover sums paid under the Law Reform (Frustrated Contracts) Act 1943 s 1(2), but that the court would exercise its discretion to make no deductions under the proviso). As to the onus of proof see *Lobb v Vasey Housing Auxiliary* [1963] VR 239, Vict SC.

However, the matter is not free from doubt and it has also been held that (1) prima facie there should be equal apportionment; and (2) the payee should be allowed the full amount of the expenditure incurred: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 800 (affd [1983] 2 AC 352, [1982] 1 All ER 925, HL).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(ii) Effect of Subsequent Impossibility or Frustration/915. Payment for valuable benefit obtained.

### **915. Payment for valuable benefit obtained.**

Where a party (A) to a contract falling within the Law Reform (Frustrated Contracts) Act 1943<sup>1</sup> has, by reason of anything done by any other party (B) in, or for the purpose of, the performance of the contract<sup>2</sup>, obtained a valuable benefit from B<sup>3</sup> or any third party<sup>4</sup> before the time of discharge<sup>5</sup>, B may recover from A such sum, if any, as the court<sup>6</sup> considers just, having regard to all the circumstances of the case<sup>7</sup>. In particular, the court must have regard to: (1) the amount of any expenses<sup>8</sup> incurred before the discharge by A in, or for the purpose of, the performance of the contract, including any sums paid or payable by A to any other party in pursuance of the contract and retained or recoverable<sup>9</sup> by that party<sup>10</sup>; and (2) the effect, in relation to the benefit, of the circumstances giving rise to the frustration of the contract<sup>11</sup>.

In the leading case on the construction of this provision, it was held that its application involved a three stage process<sup>12</sup>: (a) identification of the benefit<sup>13</sup>; (b) valuation of the benefit<sup>14</sup>; and (c) award of a just sum<sup>15</sup>.

1 See para 913 ante.

2 See para 914 ante.

3 I.e. a valuable benefit other than a payment of money to which the Law Reform (Frustrated Contracts) Act 1943 s 1(2) applies (see para 914 ante): see s 1(3). Suppose A agrees to install machinery in B's factory and while the work of installation is in progress the machinery is destroyed in a fire (cf *Appleby v Myers* (1867) LR 2 CP 651). On one view there is no benefit to B; on another view he has been benefited because the value of his property was increased by A's work although there was no opportunity to utilise or realise it; cf *Parsons Bros Ltd v Shea* (1965) 53 DLR (2d) 86 (Nfld) (claim under terms of comparable legislation where the former view was taken).

4 Where any person (A) has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract (B) upon any other person (X), whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat any benefit so conferred as a benefit obtained by the person who has assumed the obligations (A): Law Reform (Frustrated Contracts) Act 1943 s 1(6). As to insurance moneys see s 1(5); and para 918 post.

5 As to the time of discharge see para 910 ante.

6 For the meaning of 'court' see para 914 note 7 ante.

7 Law Reform (Frustrated Contracts) Act 1943 s 1(3). This provision was first judicially considered in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 938-939, [1979] 1 WLR 783 at 800 (affd [1982] 1 All ER 925, [1981] 1 WLR 232, CA; and [1983] 2 AC 352, [1982] 1 All ER 925, HL), where the owner (A) of an oil concession in a foreign country transferred a half-share in it to an oil company (B) on certain terms and that concession was expropriated by the foreign government at an early stage of its operation.

8 See para 914 note 9 ante.

9 I.e. those sums recovered under the Law Reform (Frustrated Contracts) Act 1943 s 1(2): see para 914 ante.

10 Ibid s 1(3)(a).

11 Ibid s 1(3)(b). This clearly refers to the end product of the services. It seems to allow the court to take into account the question whether the circumstances of the frustration have increased or decreased the value of the benefit, but this might lead to the strange result that a purchaser who had received part of that stipulated exchange might have to pay more for that part than the contract price for the whole: see further Glanville Williams *The Law Reform (Frustrated Contracts) Act 1943* pp 54-55.

12 See *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 939, [1979] 1 WLR 783 at 801 per Goff J. The case concerned the owner (A) of an oil concession in a foreign country, who transferred a half-share in it to an oil company (B) on certain terms (see para 917 post). The concession was expropriated by the foreign government at an early stage of its operation.

13 In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 825, [1979] 1 WLR 783 (affd [1982] 1 All ER 925, [1981] 1 WLR 232, CA; and [1983] 2 AC 352, [1982] 1 All ER 925, HL), A argued that the benefit was the prospecting services provided by B, whereas B argued that the benefit was the very much more valuable oil discovered by that prospecting. Goff J at first instance thought it would have been fairer to value the services provided, but held that, as a matter of construction, parliament intended that 'in appropriate cases', including the present one, the benefit to be the product of those services: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra at 939 and at 801 per Goff J. However, Goff J conceded (at at 939 and 802) that in some circumstances a service would have no product, in which case the value of the service should be the benefit, eg where the services consist of doing such work as surveying, or transporting goods.

The Law Reform (Frustrated Contracts) Act 1943 makes it clear there may be taken into account not only benefits obtained by A, but also those conferred on any third party (see s 1(6); and note 3 supra) and insurance moneys (see s 1(5); and para 918 post); and there has been judicial reference to apportionment where both A and B have worked to provide that benefit: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra at 940 and at 803 per Goff J.

14 Once the benefit conferred on A has been identified, it must be valued; a task which may be rendered the more difficult where it is the end product that is to be valued, because a small service may result in a very valuable end product, whereas a very valuable service may produce little benefit: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 940, [1979] 1 WLR 783 at 803 per Goff J. Whilst interest may be due on the sum awarded under the Law Reform (Frustrated Contracts) Act 1943 (see para 913 note 18 ante), the Act does not allow any account to be taken of the time value of money (see para 914 note 4 ante), so that in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* supra at 941 and 803-804, Goff J valued the benefit at the date of frustration, ignoring any benefit which A might have obtained by selling the benefit before that date. It is important to note, however, that the Law Reform (Frustrated Contracts) Act 1943 s 1(3) refers to a benefit obtained before the time of discharge: see the text to note 4 supra.

15 Out of the maximum of the above valued benefit conferred on A, the provision empowers the court to award a just sum to B. In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 942, [1979] 1 WLR 783 at 805, Goff J held that the object of the award should be the prevention of unjust enrichment of A at B's expense. The Court of Appeal preferred a broader, discretionary approach, but confirmed the decision on the basis that the matter was primarily one for the discretion of the trial judge: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 984, [1981] 1 WLR 232 at 238, CA, per Lawton LJ (delivering the judgment of the court).

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### **916. Severable provisions.**

Where it appears to the court<sup>1</sup> that a part of a contract to which the Law Reform (Frustrated Contracts) Act 1943 applies<sup>2</sup> can be severed<sup>3</sup> from the remainder of the contract, and the part in question was before the time of discharge<sup>4</sup> wholly performed, or wholly performed except for payment of sums which are or can be ascertained under the contract, the court must treat that part as if it were a separate contract and had not been frustrated and treat the statutory provisions previously mentioned<sup>5</sup> as only applicable to the remainder of the contract<sup>6</sup>. This provision leaves intact severable obligations already performed, but, in respect of the other obligations not yet performed, it departs from the common law refusal to allow the recovery of money paid or benefits conferred<sup>7</sup>.

1 For the meaning of 'court' see para 914 note 7 ante.

2 See para 913 ante.

3 As to the distinction between entire and severable (or divisible) contracts see para 922 post.

4 As to the time of discharge see para 910 ante.

5 I.e. the Law Reform (Frustrated Contracts) Act 1943 s 1; and paras 914-915 ante.

6 Ibid s 2(4).

7 See *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311; and paras 903 ante, 1078 post.

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### 917. Express provisions.

The Law Reform (Frustrated Contracts) Act 1943 does not override any provision in the contract which, on the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the provision in question operate, to frustrate the contract<sup>1</sup>, or which is intended to have effect whether such circumstances arise or not<sup>2</sup>. The court<sup>3</sup> must give effect to any such provision, and must only give effect to the provisions of the 1943 Act to such extent, if any, as appears to the court to be consistent with the provision<sup>4</sup>.

1 As to express provisions see paras 905-908 ante.

2 As to absolute promises see paras 892, 894, 905 ante.

3 For the meaning of 'court' see para 914 note 7 ante.

4 Law Reform (Frustrated Contracts) Act 1943 s 2(3). In deciding this issue, the ordinary principles of construction apply, but where there is no clear indication that the parties did intend the clause to be applicable in the event of frustration, the court has to be very careful before it draws the inference that the clause was intended to be applicable in such radically changed circumstances: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 943, 961, [1979] 1 WLR 783 at 806, 829 per Goff J; affd [1983] 2 AC 352, [1982] 1 All ER 925, HL. In this case, the House of Lords decided that the express terms of the contract did not override the Law Reform (Frustrated Contracts) Act 1943: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352 at 372-373, [1982] 1 All ER 925 at 991, HL, per Lord Brandon of Oakbrook.

The Law Reform (Frustrated Contracts) Act 1943 s 2(3) does not apply to contracts which are deemed to be frustrated under the Aircraft and Shipbuilding Industries Act 1977 s 32(1): see s 32(2)(a)(i).

### UPDATE

### 917 Express provisions

NOTE 4--Aircraft and Shipbuilding Industries Act 1977 s 32 repealed: Statute Law (Repeals) Act 2004.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/7. IMPOSSIBILITY AND MISTAKE/(3) SUBSEQUENT IMPOSSIBILITY AND FRUSTRATION/(ii) Effect of Subsequent Impossibility or Frustration/918. Insurance moneys.

**918. Insurance moneys.**

In considering whether any sum ought to be recovered or retained by any party to the contract, under the provisions of the Law Reform (Frustrated Contracts) Act 1943 which have been mentioned above<sup>1</sup>, the court<sup>2</sup> must not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation<sup>3</sup> to insure imposed by an express term of the frustrated contract or by or under any enactment<sup>4</sup>.

1     le under the Law Reform (Frustrated Contracts) Act 1943 s 1(1)-(4): see paras 914-915 ante.

2     For the meaning of 'court' see para 914 note 7 ante.

3     'Obligation' here is unlikely to mean only an enforceable legal duty; it seems rather to include cases where the contract envisages insurance being effected: see further Glanville Williams *The Law Reform (Frustrated Contracts) Act 1943* pp 57-58.

4     Law Reform (Frustrated Contracts) Act 1943 s 1(5).

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### 919. Contracts to which the 1943 Act does not apply.

The Law Reform (Frustrated Contracts) Act 1943 does not apply to any of the following types of contract: (1) any charterparty, except a time charterparty or a charterparty by demise<sup>1</sup>, or to any contract (other than a charterparty) for the carriage of goods by sea<sup>2</sup>; (2) any contract of insurance<sup>3</sup>; or (3) any contract to which the provision of the Sale of Goods Act 1979 which relates to goods perishing before sale but after agreement applies<sup>4</sup>, or any other contract for the sale, or for the sale and delivery, of specific goods<sup>5</sup> where the contract is frustrated by reason of the fact that the goods have perished<sup>6</sup>.

1 For the nature of charterparties by demise see *Sea and Land Securities Ltd v Dickinson & Co Ltd* [1942] 2 KB 65 at 69, [1942] 1 All ER 503 at 503-504, CA, per MacKinnon LJ, where it is said that they are obsolete. It seems, however, that they have become more common in recent years: see Scrutton *Charterparties* (20th Edn, 1996) p 69. See further CARRIAGE AND CARRIERS vol 7 (2008) PARAS 210-212.

2 Law Reform (Frustrated Contracts) Act 1943 s 2(5)(a). This provision preserves (subject to the exceptions stated) the old rules that freight paid in advance under a charterparty is not returned if the completion of the voyage is frustrated (see eg *Byrne v Schiller* (1871) LR 6 Exch 319), and that, unless otherwise agreed, freight (other than advance freight) is only payable when the contract is performed (see eg *St Enoch Shipping Co Ltd v Phosphate Mining Co* [1916] 2 KB 624); see further CARRIAGE AND CARRIERS. The first-mentioned rule was recognised in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 43, 67, 74, 79, [1942] 2 All ER 122 at 126, 139, 142, 145, HL, as constituting an exception to the general principle that money paid under a frustrated contract can be recovered. There was formerly some doubt whether this rule applied to a time charter: see *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* supra at 54, 71, 74, 79-80, and at 132, 140, 142, 145, HL (where the grounds of the decision in *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494, HL, were discussed). The rule does not now apply to a time charter or a charter by demise except in a case where the right to recover advance payments is expressly or impliedly excluded by the terms of the charter; cf *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* supra at 517 et seq per Lord Sumner. See also *Compania Naviera General SA v Kerametal Ltd, The Lorna I* [1983] 1 Lloyd's Rep 373, CA.

3 Law Reform (Frustrated Contracts) Act 1943 s 2(5)(b). As to insurance moneys payable on frustration see para 918 ante. In the case of a contract of insurance, the general rule is that the premium is not returnable when once the risk has attached: *Tyrie v Fletcher* (1777) 2 Cowp 666. For statutory provisions as to the return of premiums in the case of marine insurance see the Marine Insurance Act 1906 ss 82-84; and INSURANCE vol 25 (2003 Reissue) para 501 et seq.

4 In the Sale of Goods Act 1979 s 7, which provides that where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided. See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 55.

5 In this provision 'specific goods' and 'perished' have presumably the same meanings as in the Sale of Goods Act 1979 s 7 (see note 4 supra; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 54-55).

6 Law Reform (Frustrated Contracts) Act 1943 s 2(5)(c) (amended by the Sale of Goods Act 1979 s 63, Sch 2 para 2). The provision appears to be intended to exclude from the operation of the Law Reform (Frustrated Contracts) Act 1943 two further classes of contract for the sale of specific goods which subsequently perish, in addition to agreements for sale within the Sale of Goods Act 1979 s 7. These further classes are: (1) agreements for sale which do not fall within s 7 because they provide that the risk is to pass immediately; and (2) sales of goods where the property passes immediately, as distinct from agreements to sell. In the case of such sales the risk also passes immediately in the absence of agreement to the contrary (see s 20). Where the risk has passed and the goods perish after contract, the loss will fall on the buyer. Where there is a contract for the sale of specific goods and, without the seller's knowledge, the goods have perished when the contract is made the contract is void: see s 6; para 894 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 54.



**UPDATE**

**919 Contracts to which the 1943 Act does not apply**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(1) INTRODUCTION/920. Methods of discharge.

## **8. DISCHARGE OF CONTRACTUAL PROMISES**

### **(1) INTRODUCTION**

#### **920. Methods of discharge.**

The ways in which a contractual promise may be discharged may be classified under two basic headings: (1) discharge in accordance with the contract; and (2) discharge 'against' the contract<sup>1</sup>.

The former covers: (a) discharge by performance<sup>2</sup>; and (b) discharge as a result of an event stipulated in the contract<sup>3</sup>. The latter covers: (i) discharge by rescission for such matters as breach<sup>4</sup> or misrepresentation<sup>5</sup> or by subsequent agreement<sup>6</sup>; (ii) discharge by frustration<sup>7</sup>; and (iii) discharge as a result of certain miscellaneous events such as merger<sup>8</sup> and (in some cases) death<sup>9</sup> or bankruptcy<sup>10</sup>.

1 As an example of the ways in which a particular contract may be discharged it has been said (though the list is perhaps not complete) that a contract of service may be terminated in one of four ways: (1) by mutual consent; (2) by the employer or the employee giving the notice stipulated in the contract; (3) by the wrongful dismissal of the employee; or (4) by the employee terminating his contract of service contrary to his contractual obligations: *Morris v CH Bailey Ltd* [1969] 2 Lloyd's Rep 215 at 219, CA, per Salmon LJ. To these must certainly be added frustration caused by the death or disability of an employee (as to which see para 903 ante).

2 See paras 921-978 post.

3 See paras 979-985 post.

4 See paras 989-1011 post.

5 See the Misrepresentation Act 1967; and MISREPRESENTATION AND FRAUD.

6 See paras 1013-1054 post.

7 See paras 888-919 ante.

8 See paras 1062-1066 post.

9 See para 1078 post.

10 See para 1072 post.

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## (2) DISCHARGE BY PERFORMANCE OF THE CONTRACT

### (i) What Constitutes Performance

#### A. MANNER OF PERFORMANCE

##### 921. Exact performance.

The basic rule is that a promisor must perform exactly what he undertook to do<sup>1</sup>; and the question whether what has been done amounts to exact performance is a question in each case of the construction of the terms of the contract<sup>2</sup>. Examples may be grouped as follows: leases<sup>3</sup>; contracts of employment<sup>4</sup>; sales of goods<sup>5</sup>; supplies of services<sup>6</sup>; or other matters<sup>7</sup>. The promisor is not entitled to substitute for what he has promised something else which is equally advantageous to the promisee<sup>8</sup>. The parties may, however, by express agreement or waiver<sup>9</sup> substitute a different mode of performance for that originally agreed on<sup>10</sup>.

Whilst a party need not perform a stipulation which is wholly for his own benefit<sup>11</sup>, the question whether there has otherwise been a sufficient performance may arise in a number of different ways: (1) the promisor may be seeking to enforce the obligation of the promisee, to which the promisor's performance may be a condition precedent<sup>12</sup>; (2) the promisor may be resisting a claim to rescind by the promisee<sup>13</sup>; or (3) the promisor may be resisting a claim for damages by the promisee<sup>14</sup>. The doctrine of substantial performance<sup>15</sup> will be relevant to the first two of these situations but not to the third.

It is an insufficient answer to a plea of no exact performance that the promisor has acted in a way which appears to make commercial sense<sup>16</sup>. In all cases, however, the requirement of exact performance is qualified by the *de minimis* rule (that is that minute and unimportant deviations from exact compliance will be ignored<sup>17</sup>); and it is, of course, subject to any effective exclusion clause<sup>18</sup>.

Performance certificates and performance bonds are considered elsewhere in this work<sup>19</sup>.

1 When a contract expressly or impliedly provides that performance is to be carried out in a customary manner, it is to be carried out in a manner which is customary at the time when performance is called for: *Carapanayoti & Co Ltd v ET Green Ltd* [1959] 1 QB 131 at 145, [1958] 3 All ER 115 at 119; *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93 at 113, [1961] 2 All ER 179 at 183, HL, per Viscount Simonds, at 118 and at 186 per Lord Reid and at 121 and 188 per Lord Radcliffe.

2 As to the construction of contracts see *Monvia Motorship Corp v Keppel Shipyard (Private) Ltd, The Master Stelios* [1983] 1 Lloyd's Rep 356, PC; and para 772 et seq ante.

3 *Richardson v Barnes* (1849) 4 Exch 128 (agreement to give up lease of a term which had expired not satisfied by delivery of the lease with the seal torn off); *Doe d Muston v Gladwin* (1845) 6 QB 953 (covenant by lessee to insure in joint names of himself and lessor not fulfilled by insurance in name of lessee only); cf *Havens v Middleton* (1853) 10 Hare 641 (covenant by lessee to insure in name of himself and lessor sufficiently performed by insurance in name of lessor alone, on the ground that the stipulation for the joining of the lessee was for his exclusive benefit, which he might therefore dispense with); and *Beswick v Beswick* [1968] AC 58 at 92, [1967] 2 All ER 1197 at 1214, HL, per Lord Pearce.

4 *Marb  v George Edwardes (Daly's Theatre) Ltd* [1928] 1 KB 269, CA; *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] AC 209, HL; *Withers v General Theatre Corp Ltd* [1933] 2 KB 536, CA (obligation to employ under theatrical contracts); see also *Tolnay v Criterion Film Productions Ltd* [1936] 2 All ER 1625.

5 In the case of a contract for the sale of goods, if the seller delivers a quantity of goods larger or smaller than he contracted to sell, that is not a performance of the contract and the buyer is entitled to reject the goods: see the Sale of Goods Act 1979 s 30(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 172. Stipulations in contracts of sale (and other contracts) are commonly divided into conditions and warranties (see para 993 post). Where such a division is made and the issue of the right to rescind arises, eg in a sale to a consumer, what is relevant is the nature of the term broken, not whether there has been substantial performance (as to which see para 924 post), though no doubt in most cases a breach of condition will lead to seriously defective performance while a breach of warranty may still allow a substantial performance. For inter-business sales the rule was amended in 1994: see para 995 post.

As to the construction of a contract providing for payment by instalments, the whole sum to become due on default of any payment: see *Latter v Colwill*[1937] 1 All ER 442, CA.

6 *Vigers v Cook*[1919] 2 KB 475, CA (undertaker employed to carry out a funeral not entitled to recover on a quantum meruit, having failed to take the coffin into the church for part of the service). See also RESTITUTION.

7 *Kearney v West Granada Gold and Silver Mining Co* (1856) 1 H & N 412 (agreement to deliver up bills of exchange drawn in sets not complied with by delivery up of parts only of the bills); *Parry v Great Ship Co* (1863) 4 B & S 556 (agreement to keep up the insurance on a ship not performed by the signing of insurance slips, as they did not constitute a legal insurance upon which an action would be maintainable); *Edmundson v Longton Corpn* (1902) 19 TLR 15 (payment for gas by putting money in automatic slot meter, the money being stolen without negligence on the part of the person using the meter).

8 *Legh v Lillie* (1860) 6 H & N 165 (no answer to a breach of covenant not to sell off or remove manure that the tenant brought upon the premises a quantity of manure larger and better in quality than that carried away); *Forman & Co Pty Ltd v The Liddesdale*[1900] AC 190, PC (contract to effect specified repairs to a ship, instead of which plaintiffs alleged that they had done the equivalent or better); *Re L Sutro & Co and Heilbut, Symons & Co*[1917] 2 KB 348, CA (on contract for carriage of goods from Singapore to New York with liberty to call and/or tranship at other ports it was held to be a breach of the contract to send the goods from Seattle to New York by rail; evidence of a usage to do so was inadmissible as being inconsistent with the terms of the contract); doubted by Viscount Simonds in *Tsakiroglou & Co Ltd v Noble Thorl GmbH*[1962] AC 93 at 113, [1961] 2 All ER 179 at 183, HL. As to incorporation by trade usage see para 780 ante.

As to a restitutionary claim of quantum meruit after frustration or by party in breach see RESTITUTION vol 40(1) (2007 Reissue) paras 101, 117-120.

9 See paras 1014, 1025 post. As to acceptance of partial performance of an entire contract see para 923 post.

10 As to contractual variations see para 1019 et seq post.

11 *Havens v Middleton* (1853) 22 LJ Ch 746 (covenant by lessee to insure in names of lessor and himself performed by insuring only in name of lessor, because lessor not prejudiced thereby). Distinguish *Doe d Muston v Gladwin*(1845) 6 QB 953 (covenant to insure in joint names of lessor and lessee not performed by lessee insuring in his own name only); *Penniall v Harborne*(1848) 11 QB 368 (similar case).

12 See para 962 et seq post.

13 As to rescission for breach of contract see paras 989-1011 post.

14 See para 1012 post.

15 See para 924 post.

16 *Arcos Ltd v EA Ronaasen & Son*[1933] AC 470, HL (goods supplied did not comply with their description; but arbitrator had found that they were fit for the purpose supplied).

17 See *Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd*[1965] 2 QB 430, [1964] 3 All ER 333, CA; cf *Louis Dreyfus et Cie v Parnaso Cia Naviera SA*[1960] 2 QB 49, [1960] 1 All ER 759, CA.

18 As to exclusion clauses see para 797 et seq ante.

19 See *Cargill International SA v Bangladesh Sugar and Food Industries Corpn*[1998] 2 All ER 406, CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 927.

## UPDATE

### **921-924 Exact performance ... Substantial performance**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **921 Exact performance**

NOTE 5--See *Albright & Wilson UK Ltd v Biachem Ltd* [2002] UKHL 37, [2002] All ER (Comm) 753 (delivery of consignment with delivery note for different consignment was purported performance of contract to deliver first assignment only).

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## 922. Entire and divisible contracts.

There is a distinction to be drawn between contractual obligations which are divisible and those which are entire or indivisible<sup>1</sup>; and, where all the promises on one side are to be performed before any of the promises of the other side, the actual contract is said to be entire<sup>2</sup>. Whether a contractual obligation is entire or divisible is a question of construction<sup>3</sup>. The distinction is of particular importance in regard to the question whether a party who has not completely and exactly performed his own obligations may enforce those of the other party. The distinction is also of importance in relation to the doctrines of frustration<sup>4</sup> and illegality<sup>5</sup>.

Contracts are indivisible or entire<sup>6</sup> when the consideration is one and entire<sup>7</sup>; that is where, on the proper construction of the contract, no consideration is to pass from one party unless and until the whole of the entire obligations of the other party have been performed<sup>8</sup>. Except under the doctrine of substantial performance<sup>9</sup>, a party who has not completely performed<sup>10</sup> his entire promises cannot normally<sup>11</sup> demand performance by the other party<sup>12</sup>. Nor may he demand payment pro rata or allege an implied term of the original contract to contradict the express entire term<sup>13</sup>, although he may be able to allege a new contract<sup>14</sup>. He may not sue in restitution, except in so far as he can show voluntary retention of a benefit<sup>15</sup>.

If no such intention as to entire obligations is to be gathered, the contract may resolve itself into a number of considerations for a number of acts (for example, in the case of a contract to deliver goods by instalments, the price being fixed per item or per instalment). The contract may be divisible<sup>16</sup>, or alternatively it may constitute a series of separate contracts. If some contractual promises are divisible, the right to demand performance of the other party's obligations (for example, payment) arises as each part of the contract is performed<sup>17</sup>; and, where there has been partial performance, a proportionate part of the other party's performance may be demanded<sup>18</sup>.

1 As to the factors involved in the decision whether a contract is entire or divisible see generally *J Rosenthal & Sons Ltd v Esmail* [1965] 2 All ER 860 at 869, [1965] 1 WLR 1117 at 1131, 1132, HL, per Lord Pearson; and see *Ross T Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All ER 60, HL.

2 This is commonly the case where services are to be performed completely before payment: see the cases cited in note 12 *infra*.

3 *Appleby v Myers* (1867) LR 2 CP 651 at 658; *Hoening v Isaacs* [1952] 2 All ER 176 at 180, CA; *Regent OHG Aisenstadt und Barig v Francisco of Jermyn St Ltd* [1981] 3 All ER 327 at 333-334.

4 Note, however, that where a party fails to fulfil his obligations because of frustration, the common law rules discussed in this paragraph are very substantially modified by the Law Reform (Frustrated Contracts) Act 1943: see paras 913-919 *ante*.

5 As to severance of contracts involving illegality see para 877 *ante*; and see *Attwood v Lamont* [1920] 3 KB 571, CA.

6 This is the usual terminology, though one contract may of course contain both entire and divisible obligations: see *Hoening v Isaacs* [1952] 2 All ER 176 at 181, CA, per Denning LJ, where the example is given of a contract providing for progress payments as the work proceeds with retention money to be held until completion. See also *Charon (Finchley) Ltd v Singer Sewing Machine Co Ltd* (1968) 112 Sol Jo 536.

7 Such contracts are sometimes called 'lump sum contracts'; but there has been judicial reluctance to designate contracts so: see *Finlayson v James* [1986] BTLC 163, CA; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

8 *Bates v Hudson* (1825) 6 Dow & Ry KB 3 (agreement to cure 'all or none' of a flock of sheep); *Adlard v Booth* (1835) 7 C & P 108 (contract for the printing of a number of copies; destruction of printer's premises by fire before completion); *Cutter v Powell* (1795) 6 Term Rep 320 (failure to complete voyage owing to death); *Whitcher v Hall* (1826) 5 B & C 269 (contract for milking of a number of cows); *Hopkins v Prescott* (1847) 4 CB 578 (sale of business combined with public office, with undertaking to use influence for the appointment of the purchaser as successor in office); *Savage v Canning* (1867) 16 WR 133 (agreement for sale of land, with provision as to set off against purchase price); *Chater v Beckett* (1797) 7 Term Rep 201 (promise to pay the debt of another and to pay the expenses of a bankruptcy commission, in consideration of the non-prosecution of the commission); *Vigers v Cook* [1919] 2 KB 475, CA (failure to complete funeral owing to bursting of the coffin). See also *Claddagh Steamship Co v Steven & Co* 1919 SC (HL) 132 (interdependence of two separate contracts); *Hoening v Isaacs* [1952] 2 All ER 176 at 180-181, CA. As to conditions precedent see para 962 et seq post.

9 As to the doctrine of substantial performance see para 924 post.

10 The non-performance need not amount to a breach of contract: *Cutter v Powell* (1795) 6 Term Rep 320 (sailor died part way through voyage). For the effect of the Apportionment Act 1870 on terminated contracts of employment see *Moriarty v Regent's Garage and Engineering Co Ltd* [1921] 1 KB 423 (revsd on another point [1921] 2 KB 766, CA); and EMPLOYMENT vol 39 (2009) PARA 22.

11 The exceptions are: (1) where the contract is frustrated (see para 915 ante); (2) acceptance of partial performance by the promisee (see para 923 post); and (3) where the promisee prevents performance (see para 969 post).

12 *Cutter v Powell* (1795) 6 Term Rep 320; cf *Taylor v Laird* (1856) 1 H & N 266; *Bates v Hudson* (1825) 6 Dow & Ry KB 3; *Sinclair v Bowles* (1829) 9 B & C 92 at 94 per Lord Tenterden CJ ('the contract between the parties was that the plaintiff should make the chandeliers perfect for £10. The plaintiff has not performed his part of the contract, and cannot, therefore, recover anything'); *Planché v Colburn* (1831) 8 Bing 14 at 16 per Tindal CJ; *Adlard v Booth* (1835) 7 C & P 108; *Sumpter v Hedges* [1898] 1 QB 673, CA (lump-sum building contract could not be completed when builder ran out of funds); *Appleby v Myers* (1867) LR 2 CP 651 at 660, Ex Ch (contract to erect machine in building could not be completed after building destroyed by fire); *Vigers v Cook* [1919] 2 KB 475, CA (undertaker's claim for funeral); *Eshelby v Federated European Bank* [1932] 1 KB 254 (affd [1932] 1 KB 423, CA) (guarantee to take effect on completion of building contract); *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL (estate agent fails in his promise to find a buyer); *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA (contract to install central heating in a house). The principle also applies where a repairer executes different repairs from those contracted: see *Forman & Co Pty Ltd v The Liddesdale* [1900] AC 190, PC (ship repair contract carried out in workmanlike manner but not according to specifications).

13 See paras 780, 783 ante.

14 See eg the Sale of Goods Act 1979 s 30(1), (3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 172.

15 *Sumpter v Hedges* [1898] 1 QB 673, CA; and see para 618 ante.

16 See *Jackson v Rotax Motor and Cycle Co* [1910] 2 KB 937, CA; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 176 et seq. Similarly, an engagement for an uncertain period at a stated payment 'per month' was held divisible into a number of monthly contracts: *Taylor v Laird* (1856) 1 H & N 266. As to divisibility of covenants generally see *Hotham v East India Co* (1787) 1 Term Rep 638; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 267. As to mutual promises see para 966 post.

17 Performance of the whole of each divisible obligation (or separate contract) is required before payment can be recovered in respect of it.

18 *Roberts v Havelock* (1832) 3 B & Ad 404. Building contracts may, for example, provide for stage payments: see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 148 et seq. As to contracts providing for delivery of goods by instalments see the Sale of Goods Act 1979 s 31; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 176 et seq.

## UPDATE

### 921-924 Exact performance ... Substantial performance

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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### **923. Acceptance of partial performance of entire contract.**

Notwithstanding the rules mentioned in the preceding paragraph<sup>1</sup>, a claim may be made by a party who has not completely performed an entire obligation if it can be inferred from the circumstances that there is a fresh agreement between the parties that payment is to be made pro rata for work already done or goods already supplied under the original contract<sup>2</sup>, as for example where a buyer of goods accepts less than the stipulated quantity<sup>3</sup>. It is not, however, enough to bring this principle into play that the party from whom payment is demanded has received a benefit from the partial performance; he must have had, at the time when it became clear that there would not be exact performance, an opportunity to accept or reject the partial performance<sup>4</sup>. Nor is it possible, where that party had no such choice, to bring an action upon a quantum meruit<sup>5</sup>.

<sup>1</sup> See para 922 ante.

<sup>2</sup> 'Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer, or tailor or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work': *Appleby v Myers* (1867) LR 2 CP 651 at 659-660 per Blackburn J. However, this may be too wide: see *Sumpter v Hedges* [1898] 1 QB 673 at 674, CA, per AL Smith LJ (site-owner required to pay for materials of which he had made use and which had been left on the site by the builder); *Lysaght v Pearson* (1879) Times, 3 March, CA; *Astilleros Canarios SA v Cape Hatteras Shipping Co SA, The Cape Hatteras* [1982] 1 Lloyd's Rep 518. See also *Kemp v McWilliams* (1978) 87 DLR (3d) 544, Sas CA; *Pavey & Matthews Pty Ltd v Paul* (1987) 69 ALR 577, Aust HC.

<sup>3</sup> As to contracts for the sale of goods see the Sale of Goods Act 1979 s 30(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 172.

<sup>4</sup> *Sumpter v Hedges* [1898] 1 QB 673, CA (partly completed building contract); *Munro v Butt* (1858) 8 E & B 738; *Wheeler v Stratton* (1911) 105 LT 786, DC; *Small & Sons Ltd v Middlesex Real Estates Ltd* [1921] WN 245; *Ibmac Ltd v Marshall (Homes) Ltd* (1968) 208 Estates Gazette 851, CA; *Forman & Co Pty Ltd v The Liddesdale* [1900] AC 190, PC (ship repair contract carried out in workmanlike manner but not according to specifications); cf *Appleby v Myers* (1867) LR 2 CP 651, Ex Ch; and para 915 ante.

<sup>5</sup> *Sumpter v Hedges* [1898] 1 QB 673, CA (site owner cannot be expected to pay for partly built building); *Forman & Co Pty Ltd v The Liddesdale* [1900] AC 190, PC. As to quantum meruit as a restitutionary remedy see further para 618 ante; RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

## **UPDATE**

### **921-924 Exact performance ... Substantial performance**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## 924. Substantial performance.

There is some authority that the rigour of the law on exact performance of an entire obligation<sup>1</sup> is in some cases mitigated by the doctrine of substantial performance<sup>2</sup>, whereby a party (A) who has performed his entire obligation except for matters of a minor character<sup>3</sup> will be allowed to enforce the obligation of the other party (B), usually for payment of an agreed sum<sup>4</sup>; but that this will be subject, in respect of the minor matters, to a counterclaim for damages<sup>5</sup> or an allowance<sup>6</sup>. Such a rule has, apparently, been applied to building contractors who fail to complete the agreed work by way of some minor misfeasance or nonfeasance<sup>7</sup>; and to shipowners in respect of freight claimed for completed voyages where the goods are damaged<sup>8</sup>.

It has been said to be a question of construction in each case whether the parties intended that this doctrine should apply or that there should be complete and exact performance<sup>9</sup>. It is for consideration whether a factor in deciding this issue may be the relative cost of remedying the misfeasance or nonfeasance<sup>10</sup>.

1 See paras 922-923 ante.

2 The entire obligation may also be varied by a subsequent agreement between the parties: see paras 747 ante, 1019 post.

3 Distinguish the de minimis doctrine: see para 921 ante.

4 *Broom v Davis* (1794) 7 East 480n (contract to build a booth which later fell down); *Mondel v Steel* (1841) 8 M & W 858 at 870 per Parke B; *Dakin v Oxley* (1864) 15 CBNS 646 (lump sum freight, part of cargo damaged); *H Dakin & Co Ltd v Lee* [1916] 1 KB 566, CA (repairs to house not complying exactly with specifications); and the cases cited in notes 5-6 infra.

5 *Hoening v Isaacs* [1952] 2 All ER 176, CA (decoration, design and installation of fittings); *Kiely & Sons Ltd v Medcraft* (1965) 109 Sol Jo 829, CA (house decoration; substantial performance not to be measured by strict financial calculation); *Bell v Automatic School of Motoring Ltd* (1969) 113 Sol Jo 871, CA (contract for series of driving lessons); *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA (see note 11 infra). See also para 966 note 5 post.

6 If the claim is for payment for goods or services, the defendant need not bring a cross-action for damages; he may diminish the price by showing how much less the subject matter is worth by reason of the breach: see the Sale of Goods Act 1979 s 53(1)(a); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 307. See also *Mondel v Steel* (1841) 8 M & W 858 at 872 per Parke B. In such cases, as a general rule, the diminution takes effect as a true defence pro tanto to the plaintiff's claim rather than as a set-off or counterclaim; but that general rule has no application in an action for freight, so that a charterer's claim for loss or damage to cargo has to be the subject of a cross-action: *Henriksens Rederi AS v PHZ Rolimpex* [1974] QB 233, [1973] 3 All ER 589, CA; and see CIVIL PROCEDURE vol 11 (2009) para 634 et seq. As to deduction for breach of warranty from interim payments in building contracts see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS. Cf also the equitable doctrine of specific performance with compensation: see *M'Queen v Farquhar* (1805) 11 Ves 467; and SPECIFIC PERFORMANCE.

7 *H Dakin & Co Ltd v Lee* [1916] 1 KB 566, CA; *Hoening v Isaacs* [1952] 2 All ER 176, CA; *Kiely & Sons Ltd v Medcraft* (1965) 109 Sol Jo 829, CA.

8 *Dakin v Oxley* (1864) 15 CBNS 646; *William Thomas & Sons v Harrowing Steamship Co* [1915] AC 58, HL; *Henriksens Rederi AS v PHZ Rolimpex*, *The Brede* [1974] QB 233, [1973] 3 All ER 589, CA.

9 *Hoening v Isaacs* [1952] 2 All ER 176 at 178, CA, per Somervell LJ.

10 See *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA (contract to install central heating; in considering whether there had been substantial performance, account was to be taken both of the nature of the defects and the proportion between the cost of rectifying them and the contract price); *Finlayson v James* [1986] BTLC 163, CA. See also *Veregen v Red Maple Farms Ltd* (1974) 59 DLR (3d) 221, Alb SC; *Cutler Mill Restaurant v Hogg* 1996 SCLR 182, Scot Shire Ct.

## **UPDATE**

### **921-924 Exact performance ... Substantial performance**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### 925. Alternative performance.

In the case of a promise which allows performance in any number of ways<sup>1</sup>, that promise may (1) require an election; or (2) grant an option as to how it is to be performed.

If the promise requires such an election, there is no primary sense of the obligation, which must be established by that election. If the contract does not state which party is to have the right to elect<sup>2</sup>, the rule is that the promisor has the right to elect which of the methods of performance he will choose<sup>3</sup>; and, if he breaks his promise, damages are assessed on the basis most advantageous to the promisor<sup>4</sup>. Where the option rests with the promisee, notice must be given by him of the mode in which the option has been exercised<sup>5</sup>; and the liability of the other party to perform the contract does not arise until such notice has been given<sup>6</sup>. When an option has been exercised, the election cannot afterwards be revoked<sup>7</sup>. Where one of the things contracted for subsequently becomes impossible, it is a question of construction whether the promisor is bound to perform the other or is discharged altogether<sup>8</sup>.

If there is an obligation to perform in a primary sense, the contract may give one party an option to substitute another mode of performance. If the option-holder does not exercise the option, the contract is to be performed in its primary sense<sup>9</sup>. The power of choice is conferred on the option-holder solely for his own benefit<sup>10</sup>; and it can only be exercised strictly in accordance with the contract<sup>11</sup>. It follows that, if performance in the primary sense is frustrated, the option-holder is not required to perform in the other way<sup>12</sup>.

1 As to the alternative methods of accepting an offer see para 658 ante.

2 See *Chippendale v Thurston* (1829) 4 C & P 98 for an example of a case where the intention of the parties could be discovered from the contract.

3 *Layton v Pearce* (1778) 1 Doug KB 15; *Dann v Spurrier* (1803) 3 Bos & P 399; *Price v Nixon* (1814) 5 Taunt 338; *Re Brookman's Trust* (1869) 5 Ch App 182; *Reed v Kilburn Co-operative Society* (1875) LR 10 QB 264; *Tielens v Hooper* (1850) 5 Exch 830; *Christie v Wilson* 1915 SC 645; *Kurt A Becher GmbH & Co KG v Roplak Enterprises SA* [1991] 2 Lloyd's Rep 23, CA.

4 This is because it is assumed that he will choose the mode of performance most advantageous to him: see *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, [1966] 3 All ER 683, CA.

5 As to the time of election see *Brightman & Co v Born Limitada Sociedad* [1924] 2 KB 619, CA (selection among alternative cargoes); affd on other grounds sub nom *Bunge y Born Ltda Sociedad Anonima Commercial Financiera y Industrial of Buenos Aires v HA Brightman & Co* [1925] AC 799, HL.

6 *Mallam v Arden* (1833) 10 Bing 299; *Vyse v Wakefield* (1840) 6 M & W 442 (affd 7 M & W 126, Ex Ch); *Calaminus v Dowlais Iron Co* (1878) 47 LQB 575; *Honck v Muller* (1881) 7 QBD 92, CA; *Thorn v City Rice Mills* (1889) 40 ChD 357. It has been said that this principle is only applicable where the obligation of the promisor depends upon which way the promisee chooses and can only be performed effectively if the promisor has notice of the choice: *The Lady Tahilla* [1967] 1 Lloyd's Rep 591; affd [1968] 1 Lloyd's Rep 168, CA. For the position where alternative places of performance are specified see para 939 post.

7 *Schneider v Foster* (1857) 2 H & N 4; *Brown v Royal Insurance Co* (1859) 1 E & E 853; *Rugg v Weir* (1864) 16 CBNS 471; *Gath v Lees* (1865) 3 H & C 558.

8 *Anderson v Commercial Union Assurance Co* (1885) 55 LQB 146 at 150, CA, per Bowen LJ; and see para 893 ante.

9     *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, HL (contract to provide full cargo of wheat unless charterer opted to supply a mixed cargo); cf *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, [1989] 3 All ER 252.

10    *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691 at 730, [1963] 1 All ER 545 at 560, HL, per Lord Devlin.

11    See para 933 post.

12    *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691, [1963] 1 All ER 545, HL.

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## 926. Performance by another.

Despite the rule that liabilities under a contract may not be assigned without consent<sup>1</sup>, a contracting party may be entitled to secure the performance of his obligations by a third party. Thus where the contract is of such a nature that no personal skill or superintendence on the part of the promisor is required for its performance, it may as a rule<sup>2</sup> be performed either by the promisor himself or by some other proper person nominated by him for the purpose<sup>3</sup>, though in such a case the relationship between the contracting parties remains unaffected and the liability for non-performance remains in the promisor<sup>4</sup>.

Where, however, the personal performance of the promise is expressly or impliedly undertaken, the performance must prima facie<sup>5</sup> be effected by the promisor personally and the other party is entitled to object to the contract being performed by any other person<sup>6</sup>. This implication will arise where the personality of the promisor is or may be of importance, for instance where an element of personal skill or confidence is involved<sup>7</sup>.

1 See para 757 ante.

2 The contract, on its proper construction, may show a contrary intention. As to construction of the contract see para 772 et seq ante.

3 *British Waggon Co v Lea* (1880) 5 QBD 149; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd and Imperial Portland Cement Co Ltd* [1903] AC 414, HL; *Stevenson & Sons v Maule & Son* 1920 SC 335.

Where a third party performs in such circumstances, the contract may be discharged if the promisee accepts a lesser sum than that provided by the contract: *Hirachand Punamchand v Temple* [1911] 2 KB 330, CA; and see para 1045 post.

4 As to whether the third party may shelter behind exclusion clauses in the contract between the promisor and the promisee see para 814 et seq ante.

5 This is to be distinguished from performance bonds where, under a separate contract, another promises that performance: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 927.

6 *Schmalig v Tomlinson* (1815) 6 Taunt 147 (transport of goods to foreign market); *Kemp v Baerselman* [1906] 2 KB 604, CA (contract for supply of eggs, purchaser undertaking not to purchase elsewhere); cf *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd and Imperial Portland Cement Co Ltd* [1903] AC 414, HL; *James v Morgan* [1909] 1 KB 564 (agreement by mother to look after illegitimate child); *Davies v Collins* [1945] 1 All ER 247, CA (contract to clean garments; term as to exercise of care excluded right to sub-contract); *Martin v N Negin Ltd* (1945) 172 LT 275, CA (contract to clean garment; ticket containing promise of personal service and individual attention); *Edwards v Newland & Co (E Burchett Ltd, third parties)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA (contract to store goods); *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940 (carriage of copper wire); *Southway Group Ltd v Wolff* (1991) 57 BLR 33, CA.

7 *Robson v Drummond* (1831) 2 B & Ad 303 (agreement by coachmaker to supply carriage for a term of years); *Flight v Glossop* (1835) 2 Bing NC 125 (agreement for use of boxes in a theatre); *Stevens v Benning* (1855) 6 De GM & G 223; *Reade v Bentley* (1858) 4 K & J 656; *Hole v Bradbury* (1879) 12 ChD 886; *Griffith v Tower Publishing Co Ltd and Moncrieff* [1897] 1 Ch 21; *Lucas v Moncrieff* (1905) 21 TLR 683 (agreements between author and publisher); *Boulton v Jones* (1857) 2 H & N 564 (sale of goods, the promisee having a right of set-off against the promisor); *Johnson v Raylton, Dixon & Co* (1881) 7 QBD 438, CA (contract for sale of specific goods by manufacturer); *Knight v Burgess* (1864) 33 LJ Ch 727 (building agreement); *Jackson v Swarbrick* [1870] WN 133 (agreement for hire of horses, the hirer to provide stabling and drivers); *Davies v Davies* (1887) 36 ChD 359, CA (benefit of covenant by retiring partner not to trade not assignable); *Jaeger's Sanitary Woollen System Co Ltd v Walker & Sons* (1897) 77 LT 180, CA (manufacturing agreement involving skill

and supervision in performance); *International Fibre Syndicate v Dawson* (1901) 84 LT 803, HL (supply and erection of patented machine); *Harvey v Tivoli, Manchester Ltd* (1907) 23 TLR 592 (engagement of music-hall troupe); cf *Phillips v Alhambra Palace Co* [1901] 1 KB 59; *Cooper v Micklefield Coal and Lime Co Ltd, Cooper v Rayner* (1912) 107 LT 457 (contract for supply of coal on credit); *Graves v Cohen* (1929) 46 TLR 121 (contract by jockey to ride horses of an owner).

For the principle that a personal contract must be performed personally by the promisor see further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS; CHOSES IN ACTION vol 13 (2009) PARA 100. For the effect of a party to a personal contract becoming incapable of performing it see further para 903 ante.

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**927. Joint promises.**

In the case of a joint promise each of the promisors is liable as between himself and the promisee to perform the whole of the contract<sup>1</sup>, although he is entitled, if he is sued on the contract, to have the other promisors joined as defendants<sup>2</sup>.

<sup>1</sup> *Richards v Heather* (1817) 1 B & Ald 29; *Mountstephen v Brooke* (1818) 1 B & Ald 224; *King v Hoare* (1844) 13 M & W 494 at 505: see para 1079 et seq post. As to the liability of the survivors after the death of any of the joint promisors see para 1082 post.

<sup>2</sup> See para 1080 post. As to the right of one joint promisor to contribution from the others see DAMAGES; RESTITUTION vol 40(1) (2007 Reissue) para 80 et seq.



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## **B. TIME OF PERFORMANCE**

### **928. Introduction.**

Where there is a contractual term as to the time of performance, its effect is primarily a matter of construction<sup>1</sup>. Such issues as the date of default for the purposes of assessing damages<sup>2</sup> and those relating to the computation of time, including the meaning of 'day' and 'month'<sup>3</sup> are dealt with elsewhere in this work. Where a person is obliged to do a particular act on or before a certain day, he is not in default until the end of that day<sup>4</sup>.

1 *British and Commonwealth Holdings plc v Quadrex Holdings Inc*[1989] QB 842, [1989] 3 All ER 492, CA; and see para 772 et seq ante.

2 See *Postlethwaite v Freeland*(1880) 5 App Cas 599, HL (cargo to be discharged 'with all dispatch'); *Reardon Smith Ltd v Black Sea and Baltic General Insurance Co Ltd, The Indian City*[1939] AC 562, [1939] 3 All ER 444, HL (vessel to proceed in customary manner); para 929 post; and DAMAGES.

3 See *Ford v Cotesworth*(1870) LR 5 QB 544, Ex Ch; and TIME.

4 See *Afovos Shipping Co SA v Pagnan, The Afovos*[1983] 1 All ER 449, [1983] 1 WLR 195, HL (payment of hire under a charterparty payable on a certain day; held: payer not in default until midnight on that day); and para 932 post.

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### 929. Where no time specified.

Where no time for performance is fixed by the contract, the law implies an undertaking by each party to perform his part of the contract within a time which is reasonable having regard to the circumstances of the case<sup>1</sup>, as in the case of the carriage of goods<sup>2</sup>, the sale of an interest in land<sup>3</sup>, the sale of goods<sup>4</sup>, or the opening of a letter of credit or guarantee<sup>5</sup>. The position is the same where the contract merely uses indefinite expressions<sup>6</sup> as to the time of performance<sup>7</sup>, but not where the act requires the concurrence of both parties<sup>8</sup>.

1 Co Litt 208a-208b; *Potter v Deboos* (1815) 1 Stark 82; and *Hall v Wright* (1859) EB & E 765 at 781 per Bramwell B (promise to marry); *Wigginton v Dodd* (1862) 2 F & F 844 (bailment of money for investment by bailee); *De Waal v Adler* (1886) 12 App Cas 141, PC (sale of shares); *Castlegate Steamship Co Ltd v Dempsey* [1892] 1 QB 854, CA; *Lyle Shipping Co Ltd v Cardiff Corpn* [1900] 2 QB 638, CA; *Hulthen v Stewart & Co* [1903] AC 389, HL; *Barque Quilpué Ltd v Brown* [1904] 2 KB 264, CA; *Moel Tryvan Ship Co Ltd v Andrew Weir & Co* [1910] 2 KB 844 at 857, CA, per Kennedy LJ; *Diamond Cutting Works Federation Ltd v Triefus & Co Ltd* [1956] 1 Lloyd's Rep 216 (obtaining of export licence and opening of letter of credit); *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504; *Aries Powerplant Ltd v ECE Systems Ltd* (1997) 45 ConLR 111 (performance of building sub-contract).

2 *Taylor v Great Northern Rly Co* (1866) LR 1 CP 385 (common carrier of goods); *Hick v Raymond and Reid* [1893] AC 22, HL (discharge of cargo); *Carlton Steamship Co Ltd v Castle Mail Packets Co Ltd* [1898] AC 486, HL (loading of cargo).

3 *Sansom v Rhodes* (1840) 6 Bing NC 261 (time for deducing good title on sale of land); *Braithwaite v Crawshay* (1850) 16 LTOS 81 (preparation of survey); *St Leonard's, Shoreditch Vestry v Hughes* (1864) 17 CBNS 137 (rescission of contract by vendor); *Simpson v Hughes* (1896) 66 LJ Ch 143 (completion of contract for sale of land); *Nosotti v Auerbach* (1899) 15 TLR 140, CA (giving up of possession on sale of lease); *Re Longlands Farm, Long Common, Botley, Hants*; *Alford v Superior Developments Ltd* [1968] 3 All ER 552 (application for planning permission).

As to the punctual payment of interest see *MacLaine v Gatty* [1921] 1 AC 376, HL; and MORTGAGE vol 77 (2010) PARAS 214, 218.

4 *Hartwells of Oxford Ltd v British Motor Trade Association* [1951] Ch 50, [1950] 2 All ER 705, CA (delivery of car); *Monkland v Jack Barclay Ltd* [1951] 2 KB 252, [1951] 1 All ER 714, CA.

As to the time for delivery of goods under a contract for sale where no time for delivery is fixed see the Sale of Goods Act 1979 s 29(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 168.

5 *Sinason-Teicher Inter-American Grain Corpn v Oilcakes and Oilseeds Trading Co Ltd* [1954] 3 All ER 468, [1954] 1 WLR 1394, CA (issue of letter of guarantee); *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 QB 130, [1958] 1 All ER 542 (letter of credit).

6 See para 930 post.

7 See *Bunge Corpn v Usines de Stordeur SA* [1979] Abr para 507.

8 Each party must then use reasonable diligence in performing his part of the contract: see *Ford v Cotesworth* (1868) 4 QBD 127; on appeal (1870) 5 QBD 544. As to the time of payment see para 931 post; and TIME. As to parol evidence of the date of payment see para 622 note 18 ante.

## UPDATE

### 929-932 Where no time specified ... Circumstances making time of the essence

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### 930. General stipulations as to time.

Where the contract provides that it is to be performed 'as soon as possible'<sup>1</sup> or 'forthwith'<sup>2</sup> or uses similar expressions<sup>3</sup>, the particular stipulation will be construed by reference to what is reasonable in the circumstances<sup>4</sup>. What is a reasonable time in a particular case is a question of fact<sup>5</sup>. Words such as 'immediately'<sup>6</sup> or 'directly'<sup>7</sup> import a more stringent requisition than is ordinarily implied by 'reasonable time'<sup>8</sup>.

In contracts for the sale of goods delivery must be tendered at a reasonable hour<sup>9</sup>; but a stipulation for delivery 'by' a certain date is not met by delivery the next day<sup>10</sup>. In a building sub-contract, where there is no express agreement as to dates, there is an implied term that the work will be begun and completed within a reasonable time<sup>11</sup>.

1 *Hydraulic Engineering Co Ltd v McHaffie* (1878) 4 QBD 670, CA ('as soon as possible' construed as meaning within a reasonable time); *Verelst's Administratrix v Motor Union Insurance Co Ltd* [1925] 2 KB 137 (where the same words in an insurance policy were held to mean, in relation to notice of an accident, as soon as possible having regard to all existing circumstances, including the available means of knowledge of the insured's personal representative as to the existence of the policy and the identity of the insurers).

2 *Hyde v Watts* (1843) 12 M & W 254 (covenant to insure forthwith construed as obliging the covenantor to do so within a reasonable time); *Hudson v Hill* (1874) 43 LJCP 273 (ship to sail forthwith construed as meaning within a reasonable time); cf *Staunton v Wood* (1851) 16 QB 638 (contract for delivery of goods forthwith to be paid for in 14 days held to mean that delivery must be made within 14 days because the contract imported that there was to be a period of credit).

3 Eg 'immediately' or 'on demand': see *Toms v Wilson* (1862) 4 B & S 455; *Massey v Sladen* (1868) LR 4 Exch 13.

4 Not merely what the party thinks reasonable: *Hydraulic Engineering Co Ltd v McHaffie* (1878) 4 QBD 670, CA.

5 *Nelson v Patrick* (1846) 2 Car & Kir 641.

6 *Alexiadi v Robinson* (1861) 2 F & F 679.

7 *Duncan v Topham* (1849) 8 CB 225 ('directly' held to mean that the act was to be done speedily, or at least as soon as practicable, and not merely within a reasonable time). See also *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA ('punctual payment').

8 As to the computation of time and the meaning of particular expressions descriptive of periods of time generally see TIME.

9 See the Sale of Goods Act 1979 s 29(5); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 168. The old rule in *Startup v MacDonald* (1843) 6 Man & G 593, Ex Ch, where the promisor was given until midnight on the last day specified, no longer necessarily applies.

10 *Jacobson Van Den Berg & Co (UK) Ltd v Biba Ltd* (1977) 121 Sol Jo 333, CA (delivery 'by' a bank holiday not met by delivery the day after).

11 *Aries Powerplant Ltd v ECE Systems Ltd* (1997) 45 ConLR 111 (and will be completed in compliance with any agreed programme).

## UPDATE

### 929-932 Where no time specified ... Circumstances making time of the essence

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **931. Time not generally of the essence.**

At common law stipulations as to time in a contract were as a general rule<sup>1</sup>, and particularly in the case of contracts for the sale of land, considered to be of the essence of the contract<sup>2</sup>, even if they were not expressed to be so, and were construed as conditions precedent<sup>3</sup>. Therefore, one party could not insist on performance by the other unless he could show that he had performed, or was ready and willing to perform, his part of the contract within the stipulated time<sup>4</sup>. However, in the exercise of its jurisdiction to decree specific performance, the Court of Chancery adopted the rule, especially in the case of contracts for the sale of land, that stipulations as to time were not to be regarded as of the essence of the contract unless either they were made so by express terms, or it appeared from the nature of the contract, or the surrounding circumstances, that such was the intention of the parties: unless there was an express stipulation or clear indication that time should be of the essence of the contract, specific performance would be decreed even though the plaintiff failed to complete the contract or take the various steps towards completion by the date specified<sup>5</sup>.

By statute, wherever stipulations as to time are not, according to the rules of equity, deemed to be or to have become of the essence of the contract, the same rule prevails at law<sup>6</sup>. The common law rules still apply to those contracts in respect of which equity did not intervene<sup>7</sup>.

The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence, except in one of the following cases<sup>8</sup>: (1) the parties expressly stipulate that conditions as to time must be strictly complied with<sup>9</sup>; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence<sup>10</sup>; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence<sup>11</sup>.

If time is not of the essence, a party who fails to perform within the stipulated time does not commit a repudiatory breach<sup>12</sup>, but will be liable in damages<sup>13</sup>. Where there is no express time of payment<sup>14</sup> one may sometimes be implied<sup>15</sup>. With regard to a loan repayable on demand, the creditor need only allow the debtor reasonable time to get the money from some convenient place<sup>16</sup>, but this does not include time to negotiate a replacement loan<sup>17</sup>.

In determining whether the time of payment is of the essence, the above general rules usually apply<sup>18</sup>. However, in respect of sale of goods, statute provides that prima facie time of payment is not of the essence<sup>19</sup>.

1 There were common law exceptions: see eg *Martindale v Smith* (1841) 1 QB 389 at 395; *Woollfe v Horne* (1877) 2 QBD 355.

2 'The basic question is whether the failure to comply with a contractual provision within the time limited by the contract constitutes a repudiation of the contract, ie is time of the essence of that contractual provision. The phrase 'time is of the essence of the contract' is capable of causing confusion since the question in each case is whether time is of the essence of the particular contractual term which has been breached': *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842 at 856-857, [1989] 3 All ER 492 at 503-504, CA, per Browne-Wilkinson VC.

3 As to conditional contracts see para 934 post.

4 See eg *Parkin v Thorold* (1852) 16 Beav 59 at 65 per Romilly MR.

5 *Seton v Slade* (1802) 7 Ves 265; *Radcliffe v Warrington* (1806) 12 Ves 326; *Boehm v Wood* (1820) 1 Jac & W 419; *Hipwell v Knight* (1835) 1 Y & C Ex 401; *Nokes v Lord Kilmorey* (1847) 1 De G & Sm 444; *Parkin v Thorold* (1852) 16 Beav 59; *Roberts v Berry* (1853) 3 De GM & G 284; *Hudson v Temple* (1860) 29 Beav 536; *Tilley v Thomas* (1867) 3 Ch App 61; *Webb v Hughes* (1870) LR 10 Eq 281.

6 See the Law of Property Act 1925 s 41; and *Stickney v Keeble* [1915] AC 386, HL; *Smith v Hamilton* [1951] Ch 174, [1950] 2 All ER 928; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 943-944, [1977] 2 All ER 62 at 82-83, HL, per Lord Simon. See further SPECIFIC PERFORMANCE. The Law of Property Act 1925 s 41 does not preclude an action for damages: see para 935 note 9 post.

7 See notes 8-19 infra.

8 *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 943-944, [1977] 2 All ER 62 at 82-83, HL, per Lord Simon; *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842 at 857, [1989] 3 All ER 492 at 504, CA.

9 *Hudson v Temple* (1860) 29 Beav 536; *Steedman v Drinkle* [1916] 1 AC 275, PC; *Brickles v Snell* [1916] 2 AC 599, PC; *Harold Wood Brick Co Ltd v Ferris* [1935] 2 KB 198, CA; *Mussen v Van Diemen's Land Co* [1938] Ch 253, [1938] 1 All ER 210; *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA; *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA; and cf *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA.

10 See paras 932-934 post.

11 See para 935 post.

12 Provided he completes within a reasonable time thereafter, the party in breach does not have to prove that he was ready and willing to complete on the date fixed for completion: *Rightside Properties Ltd v Gray* [1975] Ch 72 at 83, [1974] 2 All ER 1169 at 1179. As to repudiatory breach see para 997 post. For the distinction between a breach giving rise to a right to rescind and one giving rise only to a right to damages see para 989 et seq post.

13 *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770; *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL. Prima facie, time is not of the essence as regards the timetable specified in a rent review clause: *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL; *Amherst v James Walker (Goldsmith and Silversmith) Ltd* [1983] Ch 305, [1983] 2 All ER 1067, CA; but see para 933 note 4 post. Other examples include the date of provision of a performance bond (*General Authority for Supply Commodities v Universal Impex SA* [1982] Com LR 210) and the date of redelivery of time chartered ships (*Torvald Klaveness A/S v Arni Maritime Corp'n, The Gregos* [1994] 4 All ER 998, [1994] 1 WLR 1465, HL).

14 See para 929 ante.

15 *Hughes v Lenny* (1839) 5 M & W 183 (implied that agreed cost should be paid as soon as work completed and given the other party a reasonable chance to inspect it). Distinguish where performance of the work is divisible: *Roberts v Havelock* (1832) 3 B & Ad 404; and para 922 ante.

16 *Toms v Wilson* (1862) 4 B & S 442 at 453; *Moore v Shelley* (1883) 8 App Cas 285 at 293, PC. Reasonableness of that time may be coloured by the debtor's knowledge and the provision of information from the creditor: *Bunbury Foods Pty Ltd v National Bank of Australia Ltd* (1984) 153 CLR 491, Aust HC.

17 *RA Cripps & Son Ltd v Wickenden* [1973] 2 All ER 606 at 616, [1973] 1 WLR 944 at 955; *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] 1 QB 842, [1989] 3 All ER 492, CA.

18 See the text and notes 6-17 supra.

19 See the Sale of Goods Act 1979 s 10(1); *Thames Sack and Bag Co Ltd v Knowles & Co Ltd* (1918) 88 LJKB 585; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 68, 467. Cf *Radio and Allied Holdings Ltd v Bowmakers* [1963] CLY 512 (composition with creditors; late payment did not discharge contract); *Pic-A-Pop Beverages Ltd v G & J Watt Co Ltd* (1975) 52 DLR (3d) 754, Sask CA (time of payment for goods supplied under a franchise). See also para 932 notes 10-11 post.

As to the time of payment of bills of exchange and promissory notes see *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA; and FINANCIAL SERVICES AND INSTITUTIONS.

## UPDATE

### 929-932 Where no time specified ... Circumstances making time of the essence

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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### 932. Circumstances making time of the essence.

Apart from express agreement<sup>1</sup> or notice making time of the essence<sup>2</sup>, the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties. Whilst the time of performance will not ordinarily be considered to be of the essence<sup>3</sup>, it will readily be so construed in a 'mercantile contract'<sup>4</sup>. For example, time will be considered of the essence in stipulations specifying a fixed date for performance in such a way as to show that the date was essential<sup>5</sup>, such as in a sale of goods<sup>6</sup>, or of shares<sup>7</sup>, or in a charterparty<sup>8</sup>. Generally, time will be considered of the essence in other cases where the nature of the contract or of the subject matter or of the circumstances of the case require precise compliance<sup>9</sup>. However, although stipulations as to the time for delivery of goods are considered essential unless a contrary intention is shown<sup>10</sup>, stipulations as to time for payment in contracts for the sale of goods are not deemed to be of the essence unless a different intention appears<sup>11</sup>.

1 See para 931 ante.

2 See para 935 post.

3 See para 931 ante.

4 *Bunge Corpn v Tradax SA* [1981] 2 All ER 5513 at 542, sub nom *Bunge Corpn, New York v Tradax SA, Panama* [1981] 1 WLR 711 at 716, HL. However, there is no presumption, either of fact or law, to this effect: *Bunge Corpn v Tradax SA* supra at 545 and at 719, HL, per Lord Lowry; *State Trading Corpn of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277, CA; *Compagnie Commerciale Sucres et Denrées v Czarnikow Ltd, The Naxos* [1990] 3 All ER 641 at 649, [1990] 1 WLR 1337 at 1347, HL; *Philbro Energy AG v Nissho Iwai Corpn, The Honam Jade* [1991] 1 Lloyd's Rep 38 at 45, 48, CA.

5 *Reuter, Hufeland & Co v Sala & Co* (1879) 4 CPD 239 at 249, CA, per Cotton LJ (sale of pepper); *Bunge Corpn v Tradax SA* [1981] 2 All ER 513 at 542, sub nom *Bunge Corpn, New York v Tradax SA, Panama* [1981] 1 WLR 711 at 716, HL; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 AC 694 at 703-704, [1983] 2 All ER 763 at 768, HL; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 2 All ER 321, sub nom *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776, HL.

6 *Bowes v Shand* (1877) 2 App Cas 455, HL (goods to be shipped March and/or April; buyer entitled to reject goods shipped in February); *Sharp v Christmas* (1892) 8 TLR 687 at 688, CA, per Lord Esher MR; *Hartley v Hymans* [1920] 3 KB 475 at 484 (cotton to be delivered by instalments between September and November 15; by latter date, only a small proportion had been delivered); *Pavia & Co SpA v Thurmann-Nielsen* [1952] 2 QB 84, [1952] 1 All ER 492, CA (cif contract, letter of credit); *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 QB 130, [1958] 1 All ER 542 (similar case); *Elmdove Ltd v Keech* (1969) 113 Sol Jo 871, CA; *Olearia Tirrena Spa v NV Algemeene Oliehandel, The Osterbek* [1973] 2 Lloyd's Rep 86, CA (buyer failed to tender vessel within time stated in the contract; seller not required to supply contract goods); *Toepfer v Lenersan-Poortman NV* [1980] 1 Lloyd's Rep 143, CA (seller's obligation to tender documents by a specified time); *Bunge GmbH v Landbouwbelaag GA* [1980] 1 Lloyd's Rep 458, CA (fob sale; notice of appropriation); *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, sub nom *Bunge Corpn, New York v Tradax SA, Panama* [1981] 1 WLR 711, HL (buyers required to give 15 days' notice of readiness to load); *Scandinavian Trading Co A/B v Zodiac Petroleum SA* [1981] 1 Lloyd's Rep 81 (delivery); *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All ER 19, [1981] 2 Lloyd's Rep 695 (seller's obligation to provide declaration of ship); *Gill & Duffus SA v Société pour l'Exportation des Sucres SA* [1986] 1 Lloyd's Rep 322, CA ('at latest'); *Nichimen Corpn v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep 46, CA (cif contract; letter of credit); *Transpetrol Ltd v Transol Olieprodukten Nederland BV* [1989] 1 Lloyd's Rep 309 (similar case); *Cie Commerciale Sucres et Denrées v C Czarnikow Ltd, The Naxos* [1990] 3 All ER 641, [1990] 1 WLR 1337, HL (seller to have goods ready to load at any time within contract period upon buyer's notice); and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 68, 168.

7 *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA (sale of shares of a speculative nature); *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA (similar case).

8 *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, CA; *Compania de Naviera Nedelka SA v Tradax Internacional SA* [1974] QB 264, [1973] 3 All ER 967, CA; *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA ('punctual' payment); *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, HL (payment to be 'semi-monthly in advance'). However, time charters may now contain an 'anti-technicality' clause: see *Afovos Shipping Co SA v Pagnan, The Afovos* [1983] 1 All ER 449, [1983] 1 WLR 195, HL; *Greenwich Marine Inc v Federal Commerce and Navigation Co Inc, The Mavro Vetranic* [1985] 1 Lloyd's Rep 580.

9 See *Newman v Rogers* (1793) 4 Bro CC 391 (sale of reversion). Examples include the purchase of a leasehold for immediate occupation (*Tilley v Thomas* (1867) 3 Ch App 61); the sale of business premises (*Macbryde v Weekes* (1856) 22 Beav 533; *Tadcaster Tower Brewery Co v Wilson* [1897] 1 Ch 705 (sale of public house); *Lock v Bell* [1931] 1 Ch 35; *Harold Wood Brick Co Ltd v Ferris* [1935] 2 KB 198, CA); and the exercise of an option to buy land or determine a lease (see para 933 note 4 post).

10 *Bowes v Shand* (1877) 2 App Cas 455, HL. See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 68, 168. It seems that a clause fixing a delivery date but expressly not guaranteeing it creates an obligation to deliver within a reasonable time of that date: *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126.

11 See the Sale of Goods Act 1979 s 10(1); para 931 note 19 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 68, 467.

## UPDATE

### 929-932 Where no time specified ... Circumstances making time of the essence

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### 933. Options.

Prima facie<sup>1</sup>, an option<sup>2</sup> to be exercised by a specified date<sup>3</sup> must in all cases be exercised strictly within the time limited for the purpose; otherwise it will lapse<sup>4</sup>. A notice of an intention to exercise the option given without authority within the time limited cannot be made effective by a ratification after the time has expired<sup>5</sup>. Where an option fixes a time for payment this must, in the absence of evidence of a contrary intention, be as strictly complied with as the stipulation relating to time for election<sup>6</sup>.

1 Note that if the grantor of the option leads the other party to believe that he will not insist on the stipulated time limit that limit will not operate: *Bruner v Moore* [1904] 1 Ch 305. As to variation see para 1019 et seq post; as to waiver see para 1025 et seq post; as to estoppel see para 1030 et seq post; and as to agreed extensions see para 936 post.

2 As to options in general see para 640 ante.

3 But the contract may provide expressly or by implication that the option is to be exercised within a reasonable time: *Moel Tryvan Ship Co Ltd v Andrew Weir & Co* [1910] 2 KB 844 at 857, CA, per Kennedy LJ; *Re Kawasaki Kisen Kabushiki Kaisha and Belships Co Ltd* [1939] 2 All ER 108.

4 For example an option for the renewal of a lease (*Nicholson v Smith* (1882) 22 ChD 640) or an option to purchase land (*Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422). Distinguish the time limits prescribed by a rent review clause, which are not of the essence of the contract because the rent review clause is not a true option: *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL. Other instances include an option for the determination of a lease under a 'break' clause (*Metrolands Investments Ltd v JH Dewhurst Ltd* [1986] 3 All ER 659, CA (time was of the essence for the break clause, but not for the rent review clause: see para 931 note 13 ante)) and an option for the purchase or repurchase of property (*Lord Ranelagh v Melton* (1864) 2 Drew & Sm 278; *Dibbins v Dibbins* [1896] 2 Ch 348; *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA; and see *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104 at 107, [1968] 1 WLR 74 at 81, CA, per Lord Denning MR, and at 111-112 and at 81 per Edmund Davies LJ. As to options to purchase the reversion, options to renew and covenants for renewal contained in leases see generally LANDLORD AND TENANT.

5 *Dibbins v Dibbins* [1896] 2 Ch 348.

6 *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA.

## UPDATE

### 933 Options

NOTE 4--See *Haugland Tankers AS v RMK Marine Gemi Yapim Sanayii ve Deniz Tasimaciligi Isletmesi AS* [2005] EWHC 321 (Comm), [2005] 1 All ER (Comm) 679.

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### **934. Conditional contracts.**

When the contract was made, the parties may have agreed that the time of performance was a condition of that contract, either in the sense of a condition precedent<sup>1</sup> or essential stipulation<sup>2</sup>. In either case, the effect of a time condition is as follows: (1) where the contract condition fixes the date for the completion of the sale, then the condition must be fulfilled by that date<sup>3</sup>; (2) where the contract condition fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time<sup>4</sup>; and (3) where the contract condition fixes the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles<sup>5</sup>.

Even where a condition precedent to formation of the contract is inserted solely for the benefit of one party, so that he might waive it, he may not do so after the expiry of the time limited for fulfilment of the condition<sup>6</sup>.

1 See paras 670 ante, 962 post.

2 See para 979 et seq post.

3 *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115, [1959] 3 All ER 910, PC; and see *SALE OF LAND*; cf *Hargreaves Transport Ltd v Lynch* [1969] 1 All ER 455, [1969] 1 WLR 215, CA.

4 *Re Longlands Farm, Long Common, Botley, Hants; Alford v Superior Developments Ltd* [1968] 3 All ER 552.

5 *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115, [1959] 3 All ER 910, PC; *Re Sandwell Park Colliery Co Ltd* [1929] 1 Ch 277; *Scott v Rania* [1966] NZLR 527, NZ CA; cf *Property and Bloodstock Ltd v Emerton* [1968] Ch 94, [1967] 3 All ER 321, CA; *Brickwoods Ltd v Butler and Walters* (1970) 23 P & CR 317, CA ('conditions' mere terms of the contract).

6 *Scott v Rania* [1966] NZLR 527, NZ CA.

### **UPDATE**

### **934 Conditional contracts**

NOTE 5--See *Mitchem v Magnus Homes South West Ltd* (1996) 74 P & CR 235, CA (agreement to sell land subject to the purchaser obtaining planning permission).

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### 935. Notice making time of the essence.

In cases where time is not originally of the essence of the contract<sup>1</sup>, or where a stipulation making time of the essence has been waived<sup>2</sup>, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken<sup>3</sup>. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given<sup>4</sup>, and to all the circumstances of the case<sup>5</sup>. Indeed, where a completion date is specified in the contract, the innocent party need not await the expiry of an unreasonable delay, but may give notice immediately the breach occurred<sup>6</sup>. Such a notice (at least where the completion of the contract can only be given effect by both parties discharging their outstanding obligations) is as binding on the party giving it as on the party receiving it<sup>7</sup>. However, if a further extension of time is given, time remains of the essence<sup>8</sup>.

Even where there is compliance with such a notice, the party to whom it is given remains liable in damages to the other party<sup>9</sup>. Where there is no such compliance, unlike the case where the parties made time of the essence in the original contract<sup>10</sup>, the effect of making time of the essence in respect of a non-essential term does not convert that term into an essential term<sup>11</sup>, rather it brings to an end the interference of equity with the legal rights of the parties<sup>12</sup>, being only evidence of a repudiatory breach rather than a repudiation per se<sup>13</sup>.

Even if the party not in default gives no notice, he may still be entitled to rescind if he proves that the other party would anyway not have been able to perform within a reasonable time<sup>14</sup>. This may be true even where the contract contains an express provision for the service of notice<sup>15</sup>.

1 See para 931 ante.

2 See para 936 post.

3 *Reynolds v Nelson* (1821) 6 Madd 18 (sale of land); *Taylor v Brown* (1839) 2 Beav 180; *Benson v Lamb* (1846) 9 Beav 502; *Parkin v Thorold* (1852) 16 Beav 59; *Webb v Hughes* (1870) LR 10 Eq 281; *Green v Sevin* (1879) 13 ChD 589; *Compton v Bagley* [1892] 1 Ch 313; *Stickney v Keeble* [1915] AC 386, HL; *Re Bagley and Shoemith's Contract* (1918) 87 LJ Ch 626; *Smith v Hamilton* [1951] Ch 174, [1950] 2 All ER 928; and see further SALE OF LAND; *Hartley v Hymans* [1920] 3 KB 475; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA (sale of goods or contract for work and labour; for the application of the rule to contracts for work and labour see further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS); *Etablissements Chainbaux SARL v Harbormaster Ltd* [1955] 1 Lloyd's Rep 303; *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA.

In the case of a contract for the sale of land where time is not otherwise of the essence, service of such a notice is in general necessary before the party who is not in default can treat the contract as at an end: cf *Smith v Hamilton* supra; but this principle does not apply to an agreement to transfer land in discharge of a debt; such an agreement is not a contract for the sale of land and, if the debtor does not fulfil it within a reasonable time, the creditor may repudiate it, even though he may not have served any notice: *Simpson v Connolly* [1953] 2 All ER 474, [1953] 1 WLR 911.

4 *Green v Sevin* (1879) 13 ChD 589; *Crawford v Toogood* (1879) 13 ChD 153. What remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact: *Stickney v Keeble* [1915] AC 386 at 419, HL; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA (unanticipated difficulties subsequent to the notice are irrelevant); *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA.

5 *Stickney v Keeble* [1915] AC 386, HL; *Re Barr's Contract* [1956] Ch 551, [1956] 2 All ER 853; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA; *Ajit v Sammy* [1967] 1 AC 255, PC.

6 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA (overruling *Smith v Hamilton* [1951] Ch 174, [1950] 2 All ER 281 on this point). Contra where the contract does not specify a completion date, when only the expiry of a reasonable time will justify the service of the notice: see note 3 supra.

7 *Finkelkraut v Monohan* [1949] 2 All ER 234; *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 All ER 729, [1974] 1 WLR 68, CA; *Oakdown Ltd v Bernstein & Co* (1984) 49 P & CR 282. As to the consequences of breach of contract see para 989 et seq post.

8 *Buckland v Farmar and Moody* [1978] 3 All ER 929, [1979] 1 WLR 221, CA.

9 *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL (the Law of Property Act 1925 s 41 only reduces the right to rescind in respect of the delay (see para 931 note 6 ante); it does not supplant the contractual completion date, for breach of which damages are obtainable).

10 See para 931 ante.

11 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1 at 12, 24, [1991] 2 All ER 477 at 486, 496, CA; *Re Olympia and York Canary Wharf Ltd (No 2)* [1993] BCC 159 at 171-173.

12 As to equitable interference with the rights of the parties see para 931 ante.

13 As to repudiation see para 997 et seq post.

14 *Etablissements Chainbaux SARL v Harbormaster Ltd* [1955] 1 Lloyd's Rep 303. Similarly, where a party in default makes it clear by his conduct that he does not intend to proceed, such a notice is unnecessary: *Re Stone and Saville's Contract* [1963] 1 All ER 353 at 356, 357, [1963] 1 WLR 163 at 171, CA, per Upjohn LJ; and see *Osborne v Australian Mutual Growth Fund* [1972] 1 NSWLR 100.

15 *Woods v Mackenzie Hill Ltd* [1975] 2 All ER 170, [1975] 1 WLR 613.

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### **936. Effect of agreed extensions.**

Where time is of the essence of the contract, the parties may agree to vary the time provision<sup>1</sup>, in which case the variation will be binding<sup>2</sup>. Alternatively, the party having the benefit of the time provision may waive<sup>3</sup> the right to insist on performance by the stipulated time and allow an extension, in which case his act does not operate as an entire waiver of the essential condition as to time, but merely has the effect of substituting the extended time for that originally fixed<sup>4</sup>.

1 As to variation of agreement see para 1013 et seq post. If there is no such variation of agreement, the announcement by one party before the time for performance that he will be unable to perform the time provision, or his putting it out of his power to perform it, may amount to an anticipatory breach. As to anticipatory breach see para 1001 post.

2 See para 1022 post. The usual rules as to the time for performance then apply to the time provision as varied: see paras 928-935 ante.

3 *Luck v White* (1973) 26 P & CR 89 (notice may be waived by the party who gave it re-opening negotiations). As to waiver and the distinction between variation and waiver see para 1025 et seq post.

4 *Barclay v Messenger* (1874) 43 LJ Ch 449; *Nokes v Lord Kilmorey* (1847) 1 De G & Sm 444; *Bernard v Williams* (1928) 139 LT 22; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA; *SCCMO (London) Ltd v Société Générale de Compensation* [1956] 1 Lloyd's Rep 290.

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### **C. PLACE OF PERFORMANCE**

#### **937. In general.**

The place for performance of a contract<sup>1</sup>, if not specified in express terms<sup>2</sup>, depends upon the intention of the parties as indicated by the nature and terms of the contract and the other circumstances of the particular case<sup>3</sup>.

<sup>1</sup> As to the time of performance see paras 928-935 ante.

<sup>2</sup> As to the specified place of performance see para 938 post. For cases where no place is specified expressly or by implication see para 940 post. For cases where alternative places are specified see para 939 post.

<sup>3</sup> *Reynolds v Coleman*(1887) 36 ChD 453, CA (contract made in England by an American to transfer shares in an English company to a person resident in England ought to be performed in England); *Thompson v Palmer*[1893] 2 QB 80, CA (contract by civil engineer resident in England with an Englishman and a foreigner resident in Spain, by which the engineer agreed to prepare drawings and superintend the construction of certain docks in Spain which he was required to visit once in every three months, the engineer to be paid his travelling expenses and a commission on the cost of construction; payment of the expenses and commission ought to be made in England, no other place being specified); *Mutzenbecher v La Aseguradora Espanola*[1906] 1 KB 254, CA (contract by a foreign company to employ an agent in England and elsewhere; contract to be performed in this country); cf *Comber v Leyland*[1898] AC 524, HL (contract to sell goods abroad and remit proceeds to England by bills; contract could all be performed abroad); *Anger v Vasnier* (1902) 18 TLR 596, CA (compromise made abroad of litigation abroad between parties, one of whom was domiciled in England: court could not infer therefrom that there was an implied term that payment should be made in England). See also *Bell & Co v Antwerp, London and Brazil Line*[1891] 1 QB 103, CA; *Rein v Stein*[1892] 1 QB 753; *Charles Duval & Co Ltd v Gans*[1904] 2 KB 685, CA; *Drexel v Drexel*[1916] 1 Ch 251; *Re Parana Plantations Ltd*[1946] 2 All ER 214, CA (contract with an English company made in Germany; provision in the contract for the refund of marks paid into the company's account at a German bank limited to refunding in Germany); *Graumann v Treite*[1940] 2 All ER 188.



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### **938. Place specified.**

Where a place for payment, or for the performance of any other act, is specified, the promisor must tender payment or performance at that place in order to discharge himself<sup>1</sup>, unless the place so specified is varied by mutual consent, or performance according to the stipulation is waived<sup>2</sup>. On the other hand, if the act is one which cannot be done without the concurrence of the promisee, it is his duty to attend at the place fixed in order to enable the promisor to fulfil the contract<sup>3</sup>.

1 *Cox v Watson* (1877) 7 ChD 196. As to discharging cargo under charterparties and bills of lading see CARRIAGE AND CARRIERS.

2 *Gyles v Hall* (1726) 2 P Wms 378 (debtor gave creditor notice of intention to pay at a specified time and place; creditor did not object; held: creditor waived personal tender elsewhere); *Leather Cloth Co v Hieronimus* (1875) LR 10 QB 140; *Neill v Whitworth* (1866) LR 1 CP 684, Ex Ch; *London and North-Western Ry Co v Bartlett* (1861) 7 H & N 400. As to variation see para 1019 et seq post; and as to waiver see para 1025 et seq post.

3 *Startup v Macdonald* (1843) 6 Man & G 593, Ex Ch; *Shep Touch* 378; *Thorn v City Rice Mills* (1889) 40 ChD 357 (condition in debenture for payment at time and place certain not broken by non-payment at the time specified unless the creditor attends at the place so specified); *Re Escalera Silver Lead Mining Co Ltd, Tweedy v Escalera Silver Lead Mining Co Ltd* (1908) 25 TLR 87. It is doubtful whether reliance may necessarily be placed today upon the opinion of Parke B in *Startup v MacDonald* supra at 624 that in such a case the promisee must be at the place of performance at such a convenient time before sunset on the day specified as will enable the promisor to complete the act by daylight. As to the computation of time generally see TIME.

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### **939. Alternative places specified.**

Where a contract specifies two or more alternative places for payment or performance, the question whether the promisor or the promisee has the right of selection depends on the intention of the parties, which is to be ascertained from the nature and terms of the contract and the surrounding circumstances<sup>1</sup>. It is the duty of the party who has the right of selection to notify the other party at which of the places he intends to perform or requires performance of the contract, as the case may be<sup>2</sup>. Where a creditor has the right to select the place of payment, until he so notifies the debtor there is no default in payment<sup>3</sup>.

<sup>1</sup> The usual rule that election lies with the promisor (see para 925 ante) does not necessarily appear to apply to election of place for payment or performance.

<sup>2</sup> *Rippinghall v Lloyd* (1833) 5 B & Ad 742 (option with vendor to verify his title by production of deeds at one of three places; duty to notify as to place chosen); cf *Cuban Atlantic Sugar Sales Corp'n v Compania De Vapores San Eleferio Lda* [1960] 1 QB 187, [1960] 1 All ER 141, CA (defendants with power under contract to nominate any port in the United Kingdom; ship lost before nomination; not possible to say that breach committed within the jurisdiction): see also para 925 ante.

<sup>3</sup> *Thorn v City Rice Mills* (1889) 40 ChD 357 (option with creditor to select at which of two places he would be paid; no default until selection made and communicated).

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#### **940. No place specified.**

Where no place for performance is specified either expressly or by implication from the nature and terms of the contract and the surrounding circumstances, and the act is one which requires the presence of both parties for completion, the general rule<sup>1</sup> is that the promisor must seek out the promisee and perform the contract wherever he may happen to be. This rule applies not only to contracts for the payment of money<sup>2</sup>, but to all promises for the performance of which the concurrence of the promisee is necessary<sup>3</sup>. If, however, a debtor gives notice to his creditor of his intention to pay at a certain time at a convenient place, and the creditor makes no objection to the notice, he will be deemed to waive the necessity of a personal tender unless he attends at the place specified<sup>4</sup>; and the general principle that a debtor must seek out his creditor has no application to wages payable by employers of labour who have a regular pay day and a regular office for making payment<sup>5</sup>.

<sup>1</sup> For special cases see para 941 post.

<sup>2</sup> *Haldane v Johnson* (1853) 8 Exch 689; *Robey v Snaefell Mining Co* (1887) 20 QBD 152; *The Eider* [1893] P 119, CA; *Thompson v Palmer* [1893] 2 QB 80, CA; *Fessard v Mugnier* (1865) 18 CBNS 286; *Charles Duval & Co Ltd v Gans* [1904] 2 KB 685, CA; *Drexel v Drexel* [1916] 1 Ch 251; *Fowler v Midland Electric Corp'n for Power Distribution Ltd* [1917] 1 Ch 656, CA.

<sup>3</sup> *Rippinghall v Lloyd* (1833) 5 B & Ad 742 (covenant to produce deeds); *Cranley v Hillary* (1813) 2 M & S 120 (delivery of promissory notes securing composition payable under deed of arrangement). As to the place of payment in the case of bills of exchange and promissory notes see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1417. As to the place of delivery in a contract for the sale of goods (an exception to the general rule) see the Sale of Goods Act 1979 s 29(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 165.

<sup>4</sup> *Gyles v Hall* (1726) 2 P Wms 378 (mortgage money lent in London; notice to pay it off at Lincoln's Inn Hall).

<sup>5</sup> *Riley v William Holland & Sons Ltd* [1911] 1 KB 1029 at 1031, CA, per Cozens-Hardy MR.

#### **UPDATE**

#### **940 No place specified**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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**941. Special cases: contracts with persons abroad and payment of rent.**

The general rule stated in the preceding paragraph<sup>1</sup> applies to contracts made with persons resident abroad<sup>2</sup>, but not where the promisee was in England at the time when the contract was made and subsequently went abroad before breach<sup>3</sup>.

In the case of a covenant to pay rent, the general rule in the preceding paragraph applies<sup>4</sup>; but where rent is reserved without any express covenant for payment and no place for payment is specified in the reservation, it is payable on the demised premises and the tenant is protected if he is ready to pay at the door of the principal house, or other notorious place, at a convenient time before sunset on the due date<sup>5</sup>.

1 See para 940 ante.

2 *Fessard v Mugnier* (1865) 18 CBNS 286 (payment under composition deed, the creditor being abroad when the debt was incurred).

3 *Fessard v Mugnier* (1865) 18 CBNS 286. But the creditor in such a case may validly direct payment to his account at a bank in England: *Shrewsbury v Shrewsbury* (1907) 23 TLR 277.

4 See *Haldane v Johnson* (1853) 8 Exch 689; and para 940 ante.

5 Co Litt 210b; *Tinckler v Prentice* (1812) 4 Taunt 549; Bro Abr, Tender, pl 41; and see further LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 259.

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## **D. PAYMENT**

### **(A) IN GENERAL**

#### **942. The duty to pay.**

The duty to pay<sup>1</sup> a promised sum of money<sup>2</sup> and the time for payment<sup>3</sup> under a contract are generally expressly regulated by its terms<sup>4</sup>, but may be implied<sup>5</sup>. In either case, the creditor has a right of action in debt<sup>6</sup>. Thus where one party has undertaken to work upon the materials of another, the right of action for the agreed remuneration arises when that party has done the work and given the employer a reasonable opportunity of ascertaining whether it has been properly done<sup>7</sup>. Where a person is employed to do work, but not upon a contract to do an entire work<sup>8</sup>, he is entitled at any stage to ask for payment in respect of the work already done and to refuse to proceed further until such payment is made<sup>9</sup>. A custom may be proved by which the person employed is not entitled to payment for any part of his work until the whole is completed<sup>10</sup>. A sub-contract may contain a provision that the sub-contractor is only to be paid when the head-contractor is paid<sup>11</sup>.

Where there is likely to be some delay between the time of contract and the time of performance, it is common in a contract for the supply of goods or services to contain a price escalation clause enabling the seller or supplier to increase the price<sup>12</sup>. Similarly, variable rate clauses may be found in loans of substantial sums of money<sup>13</sup>. In addition to the problems connected with the formation and interpretation of the contract<sup>14</sup>, the validity of price escalation clauses may sometimes be questionable<sup>15</sup>.

Whilst both may arise out of a contract, a clear distinction must be drawn between: (1) a debt; and (2) damages. An action in debt lies upon a primary obligation to pay a definite sum of money fixed and made payable by the contract on the happening of some event<sup>16</sup>; whereas a claim for damages for breach of contract is a secondary obligation arising from breach of any other primary obligation of performance<sup>17</sup>. A claim for debt may be maintained upon the happening of that event regardless of loss, whereas a claim for more than nominal damages requires proof of loss<sup>18</sup> and is subject to a number of restrictions<sup>19</sup>. Normally, a right to a debt may be freely transferred<sup>20</sup>; whereas transfers of damages claims are restricted<sup>21</sup>. Sometimes a contractual provision for payment of a specified sum of money may preclude a greater claim for damages<sup>22</sup>.

1 In the case of contracts for payment out of a particular fund, it is a matter of construction whether it is a condition precedent that such fund should furnish the means of payment, or whether that fund is indicated merely as that out of which the money is primarily to come: see *Scott v Lord Ebury*(1867) LR 2 CP 255; *Pilbrow v Pilbrow's Atmospheric Rly Co* (1848) 5 CB 440; *Smith v Nesbitt* (1845) 2 CB 286; *Williams v Hathaway*(1877) 6 ChD 544; *Steele v Gourley and Davis* (1887) 3 TLR 772, CA; *Coutts & Co v Irish Exhibition in London* (1891) 7 TLR 313, CA; *Watling v Lewis*[1911] 1 Ch 414.

2 Distinguish a claim for damages: see the text and notes 16-21 infra.

3 As to the time of performance see para 928 et seq ante. As to interest see *Dunn Trust Ltd v Feetham*[1936] 1 KB 22, CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1303 et seq. As to revalorisation see para 950 post.

4 See eg *Compagnia Industriale Lavorazione Semi Oleosi v Toepfer* [1974] 2 Lloyd's Rep 148 (buyers to receive benefit of EEC subsidy, which was expressed in terms of 'units of account'); *Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd* [1979] 1 All ER 965, [1979] 1 WLR 401, CA (fixed price contract).

5 As to the implication of a reasonable price where none is fixed see para 787 ante.

6 As to the history of the action of debt see para 602 note 1 ante.

7 *Hughes v Lenny* (1839) 5 M & W 183.

8 As to the distinction between entire and divisible contracts see para 922 ante.

9 *Roberts v Havelock* (1832) 3 B & Ad 404; *Menetone v Athawes* (1764) 3 Burr 1592; *The Tergeste* [1903] P 26 (cases of general employment of shipwrights; see further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 148). As to the method of payment for building contracts see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 148 et seq.

10 *Gillett v Mawman* (1808) 1 Taunt 137 (printer); see further CUSTOM AND USAGE.

11 *Scobie and McIntosh Ltd v Clayton Bowmore Ltd* (1990) 49 BLR 119 (payment made subject to certification). Most Commonwealth cases appear to have interpreted contra proferentem (as to which see generally para 803 ante) 'pay-when-paid' clauses: see *Iezzi Construction Pty v Currumbin Crest Development Pty* (1995) 2 Qd R 350, Aust (clause held to affect only interim payments, not final payment); *Smith and Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 (distinguishing 'pay-if-paid' clauses); cf *Brightside Mechanical and Electrical Services Group Ltd v Hyundai Engineering and Construction Co Ltd* (1988) 41 BLR 110, Sing HC.

Where there is a 'construction contract', a pay-when-paid clause is ineffective except where the payer is insolvent: see the Housing Grants, Construction and Regeneration Act 1996 ss 104, 113 (to come into force on a day appointed: see s 150(3)); and see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS; HOUSING.

12 Such clauses may give rise to problems: see eg *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, HL (disagreement as to whether the parties have finished agreeing; see paras 674-675 ante); *Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd* [1979] 1 All ER 965, [1979] 1 WLR 401, CA (price escalation clause not incorporated in contract); *Queensland Electricity Generating Board v New Hope Collieries* [1989] 1 Lloyd's Rep 205, PC (disagreement as to the construction of the contract: see para 772 et seq ante); *Vaswani v Italian Motors (Sales and Service) Ltd* [1996] 1 WLR 270, [1996] RTR 115, PC (similar case).

13 See eg *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918, CA.

14 See the cases cited in note 12 supra.

15 Some price increases may be illegal under statute (see para 884 ante); or they may amount to unfair terms within the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4), Sch 3 para 1(j) (see para 794 ante). However, activation of the clause is unlikely to render the contract frustrated: see para 904 ante.

16 *Cutter v Powell* (1795) 6 Term Rep 320 (wages payable on completion of voyage); *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, CA (sum payable on catching influenza); *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA (insurance payment repayable upon certain events); *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129, HL (guarantee); *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA (indemnity); *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL (ship-building contract; second instalment of price expressed to be due on laying keel). As to the failure of a condition precedent see para 991 post.

17 *Total Transport Corpn v Arcadia Petroleum Ltd, The Euras* [1998] 1 Lloyd's Rep 351, CA (indemnity). See also para 1012 post; and DAMAGES.

18 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA (damages). On a claim for debt (see the cases cited in note 16 supra) it may also be possible to claim damages for consequential loss arising from non-payment of the debt: *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA.

19 Claims for damages are subject to various restrictions which do not apply to debt claims, such as the rules of remoteness, mitigation and penalties; see further DAMAGES.

20 A claim in debt is a chose in action (*William Brandts Son & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL) and is usually transferable by way of assignment (see para 754 et seq ante; and CHOSSES IN ACTION vol 13 (2009)).

PARAS 5, 72 et seq). Some contracts creating debts are negotiable instruments, transferable by way of negotiation (see para 951 post; and FINANCIAL SERVICES AND INSTITUTIONS).

21 Attempts to transfer a damages claim may amount to maintenance or champerty (as to which see para 850 ante).

22 *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98, CA. Cf *Bem Dis A Turk Ticaret S/A TR v International Agri Trade Co Ltd, The Selda* [1998] 1 Lloyd's Rep 416.

## **UPDATE**

### **942 The duty to pay**

NOTE 4--See *SWI Ltd v P & I Data Services Ltd* [2007] EWCA Civ 663, [2007] BLR 430 (contractor unable to reduce amount payable to sub-contractor under fixed price contract by reducing work to be done unless term included in contract allowing variations to that effect).

NOTE 15--SI 1994/3159 reg 4(4), Sch 3 para 1(j) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 para 1(j).

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### **943. What constitutes payment.**

Where a debt is created by contract<sup>1</sup>, what constitutes payment depends on the construction of the contract<sup>2</sup>. Prima facie, the debt must be paid in sterling legal tender<sup>3</sup>, but it need not necessarily be so<sup>4</sup>, in which case a distinction may have to be drawn between the money of payment and the money of account<sup>5</sup>. Nor need the payment be made in money. The parties may in their contract agree to payment in kind<sup>6</sup>; or by cheque or other negotiable instrument<sup>7</sup>; or by letter of credit<sup>8</sup>; or by payment card<sup>9</sup>; or by credit note or voucher<sup>10</sup>. Where the creditor indicates that payment may be made into a specified bank account, the creditor has made the bank his agent to receive payment<sup>11</sup>, but an instruction to pay 'in cash' into that account only constitutes payment when the creditor has unfettered or unrestricted access to those funds<sup>12</sup>. Where both creditor and debtor have accounts at the same bank, payment is made as soon as there is an effected transfer in the books of the bank of a sum of money from the account of the debtor to that of the creditor, made with the consent of both parties<sup>13</sup>. The position with regard to lost payment sent by post is dealt with later in this title<sup>14</sup>.

The parties may subsequently agree<sup>15</sup> to substitute another obligation for that originally entered into as, for instance, by the creditor accepting payment in kind<sup>16</sup>; but payment of a lesser sum will not generally discharge a greater<sup>17</sup>. Similarly, a settlement of accounts by which items on one side are agreed to be set off against items on the other side (with any necessary adjustments in cash) amounts to payment of the sums stated on both sides of the account<sup>18</sup>; but a statement and settlement of accounts where the items are all on one side does not constitute a payment so as to preclude either party from showing that the accounts were wrong<sup>19</sup>.

1 See para 942 ante.

2 *Edmundson v Longton Corp* (1902) 19 TLR 15 (money put in automatic slot gas meter; stolen without negligence); *Re Charge Card Services Ltd* [1989] Ch 497, [1988] 3 All ER 702, CA (charge card); and see para 772 et seq ante.

3 See para 975 et seq post.

4 As to the rate of exchange applicable for the conversion of sterling where the debt is to be paid abroad in foreign currency see eg *Cummings v London Bullion Co Ltd* [1952] 1 KB 327, [1952] 1 All ER 383, CA; and FINANCIAL SERVICES AND INSTITUTIONS. As to the appropriate rate of exchange at which to convert damages for breach of contract or tort calculated in foreign currency see *SS Celia v SS Volturno* [1921] 2 AC 544 at 548, HL; *Madeleine Vionnet et Cie v Wills* [1939] 4 All ER 136, CA; *The Despina R*; *The Folias* [1979] AC 685, [1979] 1 All ER 421, HL; and DAMAGES. As regards the rate of exchange applicable where a foreign judgment is enforced in this country see *East India Trading Co Inc v Carmel Exporters and Importers Ltd* [1952] 2 QB 439; and as regards reciprocal enforcement of judgments see generally CONFLICT OF LAWS.

5 For the distinction between money of payment and money of account see *Feist v Société Intercommunale Belge d'Electricité* [1934] AC 161, HL; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23 at 54, [1971] 1 All ER 665 at 667, CA, per Lord Denning MR; affd [1972] AC 741, [1972] 2 All ER 271, HL; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1299. As to tender of money see para 971 et seq post.

6 *Hands v Burton* (1808) 9 East 349; *Saxty v Wilkin* (1843) 11 M & W 622; *Smith v Battams* (1857) 26 LJ Ex 232. As to what constitutes payment in cash for the purposes of the Companies Act 1985 s 88(2)(b) see COMPANIES.

7 See para 951 et seq post.



8 See *Davy Offshore Ltd v Emerald Field Contracting Ltd* [1992] 2 Lloyd's Rep 142, CA.

9 See para 945 post.

10 Eg payment may be made by credit note, gift voucher or trading stamp.

11 See para 944 post.

12 *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1973] 1 All ER 769 at 782, sub nom *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA, The Brimnes* [1973] 1 WLR 386 at 400 (affd *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA); approved with amendment in *A/S Awilco of Oslo v Fulvia SpA Di Navigazione of Cagliari, The Chikuma* [1981] 1 All ER 652 at 657, [1981] 1 WLR 314 at 320, HL. See also *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, HL.

13 *Bolton v Richard* (1795) 6 Term Rep 139; *Bodenham v Purchas* (1818) 2 B & Ald 39; *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA (instruction by telex to bank does not amount to a payment until the bank, in the ordinary course of business, acts on the telex and makes the transfer); *Momm v Barclays Bank International Ltd* [1977] QB 790, [1976] 3 All ER 588; *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyd's Rep 194.

14 See para 948 post.

15 As to variation, waiver or novation of contractual obligations see paras 1019 et seq, 1025 et seq, 1036 et seq post.

16 *Hands v Burton* (1808) 9 East 349; *Saxty v Wilkin* (1843) 11 M & W 622; *Smith v Battams* (1857) 26 LJ Ex 232; *Pinnel's Case* (1602) 5 Co Rep 117a; *Young v Rudd* (1695) 1 Ld Raym 60. Where it is understood between an employer and a person employed that services are to be rendered not for remuneration, but in expectation of a legacy, the person employed cannot sue the estate for remuneration if the legacy fails (*Osborn v Governors of Guy's Hospital* (1726) 2 Stra 728) unless there is a breach of contract; see further WILLS.

17 This is because there is no consideration (unless there is no liquidated sum due, or the amount due is uncertain or disputed). As to payment of a lesser sum and accord and satisfaction see para 1043 et seq post.

18 *Kinnerley v Hossack* (1809) 2 Taunt 170; *Cleworth v Pickford* (1840) 7 M & W 314; *Callander v Howard* (1850) 10 CB 290; *Livingstone v Whiting* (1850) 15 QB 722; *Re Harmony and Montague Tin and Copper Mining Co* (1873) LR 8 Ch App 407; *Larocque v Beauchemin* [1897] AC 358, PC; *North Sydney Investment and Tramway Co Ltd v Higgins* [1899] AC 263, PC. As to account stated see para 1049 post.

19 *Perry v Attwood* (1856) 25 LJQB 408; *Smith v Page* (1846) 15 M & W 683.

## UPDATE

### 943 What constitutes payment

NOTE 6--Companies Act 1985 s 88(2) replaced by Companies Act 2006 s 555(2). See further COMPANIES vol 15 (2009) PARAS 1108, 1109.

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#### **944. Payment to a third person.**

Payment by a debtor to a third person at the request of the creditor is equivalent to payment to the creditor<sup>1</sup>. Payment to an agent with express authority to receive payment discharges the debt, as does payment in the ordinary course of business to a person held out as having authority to receive payment<sup>2</sup>. The mere fact that an agent is authorised to sell goods does not necessarily authorise him to receive payment<sup>3</sup>, but a solicitor authorised to act may have such an implied authority<sup>4</sup>. Conversely, where an auctioneer has an unsatisfied lien on the proceeds of goods sold by him, the buyer must pay him, because his special property in the goods entitles him to sue in his own name<sup>5</sup>. Moreover, payment to one of several joint creditors *prima facie* discharges a debt owed to them jointly<sup>6</sup>; for instance, to a partner<sup>7</sup>, or trustee<sup>8</sup>, or one of a deceased creditor's personal representatives<sup>9</sup>, or a creditor's trustee in bankruptcy<sup>10</sup>.

As a general rule a person who is authorised to receive payment has no implied authority to take a cheque<sup>11</sup> or receive payment otherwise than in money<sup>12</sup>, but such authority may be implied from the conduct of the principal or the usual course of business<sup>13</sup>. Where a cheque taken by an agent has been paid, the transaction is equivalent to a payment in cash<sup>14</sup>; and the same is true of payment cards<sup>15</sup>.

An authority given to an agent to receive payment does not authorise a settlement of accounts between him and the debtor by setting off a debt due from the agent to the debtor<sup>16</sup>, unless this can be justified by a known usage which is binding on the creditor<sup>17</sup>, or the principal is undisclosed<sup>18</sup>.

1 *Roper v Bumford* (1810) 3 Taunt 76. See also *Page v Meek* (1862) 32 LJQB 4; and cf *Commercial Bank of Australia v Wilson & Co's Estate, Official Assignee* [1893] AC 181, PC. As to payment by a garnishee see para 946 post.

2 *Barrett v Deere* (1828) Mood & M 200. As to the authority of an agent see AGENCY vol 1 (2008) PARA 29 et seq. As to the authority of an auctioneer see AUCTION vol 2(3) (Reissue) para 206 et seq; and as to the authority of a solicitor see LEGAL PROFESSIONS vol 66 (2009) PARA 786 et seq.

3 *Drakeford v Piercy* (1866) 7 B & S 515; *International Sponge Importers Ltd v Andrew Watt & Sons* [1911] AC 279, HL; *Butwick v Grant* [1924] 2 KB 483.

4 See eg *Yates v Freckleton* (1781) 2 Doug KB 623 (attorney instructed to sue for debt). As to a solicitor's receipt of consideration expressed in a deed see the Law of Property Act 1925 s 69; the Trustee Act 1925 s 23(3)(a); and LEGAL PROFESSIONS vol 66 (2009) PARA 787; SALE OF LAND.

5 See *Williams v Millington* (1788) 1 Hy Bl 81; and AUCTION vol 2(3) (Reissue) para 258.

6 See para 1086 post.

7 *Porter and Bristow v Taylor* (1817) 6 M & S 156. As to partnership generally see PARTNERSHIP.

8 See *Husband v Davis* (1851) 10 CB 645. As to trustees generally see TRUSTS.

9 *Can v Read* (1749) 3 Atk 695. As to the death of a joint promisee see para 1082 post.

10 See the Insolvency Act 1986 s 314(1)(b), Sch 5 para 10; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 461.

11 *Blumberg v Life Interests and Reversionary Securities Corp'n* [1897] 1 Ch 171; affd [1898] 1 Ch 27, CA.

12 If the principal wishes his agent to receive payment by cheque and not in cash, he must so notify the debtor: *International Sponge Importers Ltd v Andrew Watt & Sons* [1911] AC 279, HL.

13 *Williams v Evans* (1866) LR 1 QB 352; *Hogarth v Wherley* (1875) LR 10 CP 630; *Charles v Blackwell* (1877) 2 CPD 151, CA; *Papé v Westacott* [1894] 1 QB 272, CA; *Blumberg v Life Interests and Reversionary Securities Corp*n [1897] 1 Ch 171; affd [1898] 1 Ch 27, CA. See also AGENCY vol 1 (2008) PARA 38.

14 *Bridges v Garrett* (1870) LR 5 CP 451, Ex Ch; *Walker v Barker* (1900) 16 TLR 393.

15 See para 945 post.

16 *Bartlett v Pentland* (1830) 10 B & C 760; *Barker v Greenwood* (1837) 2 Y & C Ex 414; *Pearson v Scott* (1878) 9 ChD 198; *Anderson v Sutherland* (1897) 2 Com Cas 65.

17 *Stewart v Aberdein* (1838) 4 M & W 211; *Catterall v Hindle* (1867) LR 2 CP 368, Ex Ch; and see CUSTOM AND USAGE.

18 *Coates v Lewes* (1808) 1 Camp 444.

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#### **945. Payment by a third person.**

Except in the case of payment by a joint debtor<sup>1</sup>, payment by a third person is not sufficient to discharge a debt, unless it is made by him as agent for and on behalf of the debtor and with his prior authority, or it is subsequently ratified by the debtor<sup>2</sup>. A payment made on behalf of the debtor may be ratified by him even after action is brought, and a plea of payment is a sufficient ratification<sup>3</sup>; but the creditor and the person who has made the payment may agree to cancel what has taken place between them at any time before the debtor has affirmed it and, if they do so, it is then too late for the debtor to ratify the payment<sup>4</sup>.

A card-issuer (C) may set up a payment card system, under which C agrees with certain retailers under franchise agreements that holders of C's cards may purchase goods or services from those retailers, charging the consideration to the card<sup>5</sup>. C will pay the retailer the amount so charged and in turn C will charge that amount to the card-holder<sup>6</sup>. The payment card issued to the card-holder may be a charge card, debit card or credit card<sup>7</sup>. In most cases credit cards are likely to be regulated<sup>8</sup>; the agreement between C and the card-holder amounting to a credit token agreement<sup>9</sup>. It has been decided that, when the retailer in the above situation accepts a payment card for payment of the debt created by the supply of goods or services, that operates as absolute payment by the card-holder to the retailer<sup>10</sup>, not conditional payment like a cheque<sup>11</sup>. The result is that, where C fails to pay the retailer the amount so charged, the retailer has no recourse against the card-holder, leaving the retailer bearing the risk of the card-issuer's insolvency<sup>12</sup>.

1 See para 1086 post.

2 *McIntyre v Miller* (1845) 13 M & W 725; *Belshaw v Bush* (1851) 11 CB 191; *James v Isaacs* (1852) 12 CB 791; *Kemp v Balls* (1854) 10 Exch 607; *Simpson v Eggington* (1855) 10 Exch 845; *Lucas v Wilkinson* (1856) 1 H & N 420; *Keighley, Maxsted & Co v Durant* [1901] AC 240, HL; *Re Rowe, ex p Derenburg & Co* [1904] 2 KB 483, CA; *Smith v Cox* [1940] 2 KB 558, [1940] 3 All ER 546. See also AGENCY vol 1 (2008) PARA 111; and RESTITUTION vol 40(1) (2007 Reissue) para 62 et seq.

3 *Belshaw v Bush* (1851) 11 CB 191. As to payment of a lesser sum by a third party see para 1045 post.

4 *Walter v James* (1871) LR 6 Exch 124.

5 The card-holder will normally be aware that that the retailer is providing such a payment service because the retailer will exhibit on his premises and stationery the logo of the card issuer. As to such agreements see CONSUMER CREDIT.

6 *Re Charge Card Services Ltd* [1989] Ch 497, [1988] 3 All ER 702, CA (charge card).

7 The differences between these types of (usually plastic) payment card are as follows. Under a charge card, the card-holder must discharge his indebtedness to C in full at the end of the agreed charging period (usually a month). Under a debit card, C will usually charge the card-holder's account immediately (commonly electronically); and under a credit card, at the end of the agreed charging period the card-holder has the option of either paying off the debt or rolling it over to the next charging period. These forms of payment card should be distinguished from other forms of plastic card, such as: (1) cash cards to obtain cash from automatic tellers; (2) cheque guarantee cards (although in practice some cards have more than one function and a payment card may also be used as a cash card and/or a cheque guarantee card). See also para 952 post. See generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 904, 905.

8 Charge cards are usually exempt from the Consumer Credit Act 1974 because the outstanding debt is paid off at the end of the charging period. Debit cards are usually exempt because there is no significant credit.

- 9 See the Consumer Credit Act 1974 s 14; and CONSUMER CREDIT vol 9(1) (Reissue) para 88.
- 10 *Re Charge Card Services Ltd* [1989] Ch 497, [1988] 3 All ER 702, CA (charge card).
- 11 See para 952 post.
- 12 *Re Charge Card Services Ltd* [1989] Ch 497, [1988] 3 All ER 702, CA (charge card).

## **UPDATE**

### **945 Payment by a third person**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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#### **946. Payment by a garnishee.**

Payment made by a garnishee under compulsion of law in garnishee proceedings operates as a valid discharge of his liability to the judgment debtor to the extent of the amount paid or levied, even though the proceedings may be set aside, or the judgment or order from which they arose reversed<sup>1</sup>. A garnishee cannot discharge himself from liability to his creditor by any payment to a third person which is made other than by compulsion of law<sup>2</sup>.

<sup>1</sup> See RSC Ord 49 r 8; CCR Ord 30. See also *Re Smith, ex p Brown* (1888) 20 QBD 321, CA; *Turnbull v Robertson* (1878) 38 LT 389; *Culverhouse v Wickens* (1868) LR 3 CP 295; and CIVIL PROCEDURE.

<sup>2</sup> *Turner v Jones* (1857) 1 H & N 878; *London Corp'n v London Joint Stock Bank* (1881) 6 App Cas 393 at 415, HL, per Lord Blackburn; *Re Webster, ex p Official Receiver* [1907] 1 KB 623, DC. Payment with the consent of his creditor would discharge the garnishee even without the compulsion of an order absolute: see para 944 ante. As to payment under a garnishee order of a debt due to a foreign debtor resident outside the jurisdiction see *Swiss Bank Corp'n v Boehmische Industrial Bank* [1923] 1 KB 673, CA.

#### **UPDATE**

#### **946 Payment by a garnishee**

TEXT AND NOTE 1--RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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#### **947. Proof of payment: receipts.**

A payment may be proved either by the production of a receipt or by any other evidence from which the fact of payment may be inferred<sup>1</sup>; and a payment may be presumed from the length of time which has elapsed since the debt became due, even though it may not be barred by the lapse of time, in the absence of any explanation of the delay<sup>2</sup>.

At common law, a receipt may be in any form so long as its intention is clear<sup>3</sup>. A receipt in the body of a deed may be a sufficient discharge<sup>4</sup>. By statute, an unindorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque<sup>5</sup>. In no case does a receipt nowadays require to be stamped<sup>6</sup>. As between debtor and creditor, a receipt is only prima facie evidence of payment of the sum mentioned<sup>7</sup>, even if given by deed<sup>8</sup>. This is because a receipt is not conclusive evidence of payment, but merely an admission, and evidence is admissible to prove the intention with which it was given and whether any payment was in fact made, and if so, on what terms and in respect of what matter<sup>9</sup>. However, where a third party relies upon a receipt, the signatory may be estopped from denying payment<sup>10</sup>.

Even where a receipt or other evidence proves payment of the mentioned sum, this will not necessarily discharge the debt even if expressed to be 'in full discharge', unless the sum mentioned is no less than the debt. This is because payment of a lesser sum by the debtor<sup>11</sup> will not discharge the debt<sup>12</sup>, unless made by deed<sup>13</sup>.

1 *Mountford v Harper* (1847) 16 LJ Ex 184 (proof that the creditor received the proceeds of a cheque drawn by the debtor held sufficient evidence of payment without any proof that the creditor received the cheque from the debtor); *Egg v Barnett* (1800) 3 Esp 196 (production of cheque by drawer); *Gadderer v Dawes* (1847) 10 LTOS 109 (discounting of bill by creditor, and retention of part of proceeds); *Eyles v Ellis* (1827) 4 Bing 112.

2 *Cooper v Turner* (1819) 2 Stark 497; *Douglass v Lloyds Bank Ltd* (1929) 34 Com Cas 263.

3 A statutory form is sometimes required: see eg the Bills of Sale Act (1878) Amendment Act 1882 s 9; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1711.

4 See the Law of Property Act 1925 s 67; and SALE OF LAND.

5 Cheques Act 1957 s 3(1) (renumbered by the Deregulation (Bills of Exchange) Order 1996, SI 1996/2993, art 5). See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 890.

6 The stamp duty which was formerly imposed on receipts for sums of £2 or upwards has been abolished: see the Finance Act 1970 s 32, Sch 7 para 2(2)(b).

7 *Straton v Rastall* (1788) 2 Term Rep 366; *Hawkins v Gardiner* (1854) 2 Sm & G 441; *Wilson v Keating* (1859) 27 Beav 121.

8 See *Burchell v Thompson* [1920] 2 KB 80, DC; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 223.

9 *Wyatt v Marquis of Hertford* (1802) 3 East 147 (acceptance of security from agent and receipt given); *Skaife v Jackson* (1824) 3 B & C 421 (receipt obtained by fraud); *Graves v Key* (1832) 3 B & Ad 313 (evidence of payment of bill of exchange); *Farrar v Hutchinson* (1839) 9 Ad & El 641 (receipt given in fraud of partners); *Foster v Dawber* (1851) 6 Exch 839 (burden of impeaching receipt lies on plaintiff); *Bowes v Foster* (1858) 2 H & N 779 (receipt given as part of a pretended sale); *Cesarini v Ronzani* (1858) 1 F & F 339 (receipt signed by mistake); *Lee v Lancashire and Yorkshire Rly Co* (1871) 6 Ch App 527 (receipt in full satisfaction of all claims); *Ellen v Great Northern Rly Co* (1901) 17 TLR 453, CA; *Oliver v Nautilus Steamship Co* [1903] 2 KB 639, CA (receipt as evidence of election of remedy under statute); *Huckle v London County Council* (1910) 27 TLR 112,

CA; *Re WW Duncan & Co* [1905] 1 Ch 307 (receipt for final dividend expressed to be in full discharge, there being an outstanding question of claim to interest); *Nathan v Ogdens Ltd* (1905) 94 LT 126, CA (receipt for final bonus distribution; a subsequent claim for breach of contract under the bonus scheme was maintainable).

10 *Rimmer v Webster* [1902] 2 Ch 163. As to estoppel generally see ESTOPPEL. As to the discharge of a mortgage held by a building society by means of a receipt indorsed thereon see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2021.

11 It is otherwise if payment is by a third party: see para 1045 note 22 post.

12 See para 1045 note 6 post.

13 In this case it amounts to a release. As to release see para 1052 et seq post.



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#### **948. Payment by post.**

The posting of a cheque or other instrument, or of money, which is lost before it reaches the creditor does not amount to payment<sup>1</sup>, unless the creditor requested the debtor to pay in that manner, in which case he may<sup>2</sup> be taken to have run the risk of its being lost<sup>3</sup>. Such a request will be construed as being an authority to remit in a form which is appropriate to the amount involved<sup>4</sup>. Since 1992 the risk may be small, as most cheques are now non-negotiable<sup>5</sup> and therefore it is more likely that there is implied permission to pay by posted cheque.

<sup>1</sup> *Luttges v Sherwood* (1895) 11 TLR 233; *Pennington v Crossley & Son* (1897) 77 LT 43, CA; *Baker v Lipton* (1899) 15 TLR 435.

<sup>2</sup> In *Pennington v Crossley & Sons Ltd* (1897) 13 TLR 513, CA, the defendants had been for many years in the habit of purchasing goods from the plaintiff, and paying for them, without objection, by means of cheques through the post; but it was held that there was nothing from which a request by the plaintiff for payment in that manner could be inferred so as to throw the loss of a cheque during transmission on him.

<sup>3</sup> *Norman v Ricketts* (1886) 3 TLR 182, CA; *Warwicke v Noakes* (1791) Peake 68; cf *Tankexpress AS v Compagnie Financière Belge des Petroles SA* [1949] AC 76, [1948] 2 All ER 939, HL (shipowners regularly accepted payment of hire by cheque instead of cash and could not suddenly vary this accepted method of performance without first notifying charterers so as to allow them to conform with the strict terms of the contract).

As to provisions relating to lost bills of exchange see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1507-1508.

<sup>4</sup> *Mitchell-Henry v Norwich Union Life Insurance Society* [1918] 2 KB 67, CA (a request to return a notice of the amount due 'when remitting' held to have impliedly authorised payment through the post, but the amount involved being £48, this was held to have been improperly sent in the form of Treasury notes, although by registered post). See also *Robb v Gow Bros and Gemmell* (1905) 8 F 90, Ct of Sess (uncrossed bearer cheque posted).

<sup>5</sup> See the Cheques Act 1992; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1411, 1499.

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### 949. Unlawful harassment.

A person commits an offence if, with the object of coercing another person to pay money claimed<sup>1</sup> from that other as a debt due under a contract<sup>2</sup>, he (1) harasses<sup>3</sup> that other with demands for payment<sup>4</sup> which, because of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation<sup>5</sup>; (2) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it<sup>6</sup>; (3) falsely represents himself to be authorised in some official capacity to claim or enforce payment<sup>7</sup>; or (4) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not<sup>8</sup>.

The offence is punishable on summary conviction by a fine not exceeding level 5 on the standard scale<sup>9</sup>.

1 It seems that the offence is intended to protect two classes of person: (1) those who do not owe money under a contract, either because they were never so indebted, or have repaid it; and (2) those who remain so indebted.

2 It would seem, therefore, that the provision cannot apply to a debt in respect of which a judgment has been obtained (see the Administration of Justice Act 1970 s 40(3); and note 5 *infra*); nor does it seem to apply to suppliers of gas, water and electricity due under statute rather than contract: *Norweb plc v Dixon* [1995] 3 All ER 952, [1995] 1 WLR 636, DC.

3 For provisions relating to harassment of tenants and occupiers of caravans see the Protection from Eviction Act 1977; the Caravan Sites Act 1968 s 3 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 608-612.

4 See para 970 *post*. It is not clear whether an attempt to re-take goods subject to a hire-purchase agreement could fall within this provision. As to hire-purchase see further CONSUMER CREDIT.

5 Administration of Justice Act 1970 s 40(1)(a). A person may be guilty under s 40(1)(a) if he consents with others in the taking of such action although his own course of conduct does not by itself amount to harassment: s 40(2). Section 40(1)(a) does not apply to anything done by a person which is reasonable, and otherwise permissible in law, for the purpose of securing the discharge of an obligation due, or believed by him to be due, to himself or to persons for whom he acts, or protecting himself or them from future loss, or for the purpose of the enforcement of any liability by legal process: s 40(3).

6 *Ibid* s 40(1)(b).

7 *Ibid* s 40(1)(c).

8 *Ibid* s 40(1)(d).

9 *Ibid* s 40(4) (amended by virtue of the Criminal Justice Act 1982 ss 35, 38, 46). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37(2) (as substituted): Interpretation Act 1978 s 5, Sch 1 (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58(a)). See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 1991 s 18 (substituted by the Criminal Justice Act 1993 s 65); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

### UPDATE

**949 Unlawful harassment**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 5--Administration of Justice Act 1970 s 40(1) does not apply to anything done by a person to another in circumstances where what is done is a commercial practice within the meaning of the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, and the other is a consumer in relation to that practice: Administration of Justice Act 1970 s 40(3A) (added by SI 2008/1277).

1991 Act s 18, consolidated in the Powers of Criminal Courts (Sentencing) Act 2000 s 128, repealed: Criminal Justice Act 2003 Sch 37 Pt 7. See now s 162.

NOTE 9--1991 Act s 18, consolidated in the Powers of Criminal Courts (Sentencing) Act 2000 s 128, repealed: Criminal Justice Act 2003 Sch 37 Pt 7. See now s 162.

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### 950. Revalorisation.

Under English common law, *prima facie* a debt payable at a future time involves an obligation to pay the nominal amount of the debt at the date of payment in whatever is legal currency at that date<sup>1</sup>, ignoring any fluctuations in that currency<sup>2</sup>. This principle (called the principle of nominalism) also applies where a debt governed by English law is expressed to be payable in a foreign currency<sup>3</sup>; and a similar rule is likely to obtain where a debt governed by a foreign law is expressed in a foreign currency<sup>4</sup>.

The above principle of nominalism leaves the creditor at risk of currency depreciation and the debtor at risk of currency appreciation. In international contracts, it used to be common for parties to protect themselves against this risk by what are known as 'gold clauses'<sup>5</sup>; but more recently, such devices as 'index-linking' clauses have appeared<sup>6</sup>. In domestic contracts, price escalation clauses have appeared<sup>7</sup>.

1 As to what amounts to sterling legal tender see para 975 post.

2 *British Bank for Foreign Trade v Russian Commercial and Industrial Bank* (1921) 38 TLR 65; *Ottoman Bank of Nicosia v Chakarian* [1938] AC 260, [1938] 4 All ER 570, PC; *Bonython v Commonwealth of Australia* [1951] AC 201, PC; *Treseder-Griffin v Co-Operative Insurance Ltd* [1956] 2 QB 127, [1956] 2 All ER 33, CA. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 113; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1300.

3 *Re Chesterman's Trusts, Mott v Browning* [1923] 2 Ch 466, CA; *Pymont Ltd v Schott* [1939] AC 145, [1938] 4 All ER 713, PC; and see CONFLICT OF LAWS vol 8(3) (Reissue) para 386.

4 See *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801, HL; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 113; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1302.

5 See *Feist v Société Intercommunale Belge d'Electricité* [1934] AC 161, HL; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 113; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1299.

6 See *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 113; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1300.

7 See para 942 ante.

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## (B) BY CHEQUE OR NEGOTIABLE INSTRUMENT

### 951. General rule.

In the absence of special agreement<sup>1</sup>, a creditor is not bound to accept payment of a debt otherwise than in legal tender<sup>2</sup>. However, where a cheque or negotiable instrument<sup>3</sup> is given by the debtor and accepted by the creditor<sup>4</sup>, the question upon what terms it is given is one of fact, depending on the intention of the parties<sup>5</sup>. The creditor may accept the instrument (1) in absolute satisfaction of the debt, in which case he takes the risk of its being dishonoured and can only sue on it<sup>6</sup>; (2) as conditional payment only, the effect of which is to suspend his remedies during the currency of the instrument<sup>7</sup>; or (3) merely as collateral security for the debt, in which case it does not affect the existing remedies for the debt<sup>8</sup>. In the absence of evidence of the choice of one of the other two possibilities the giving of a negotiable instrument will be treated as a conditional payment<sup>9</sup>.

Payment by confirmed letter of credit is considered elsewhere<sup>10</sup>; such a transaction will generally constitute conditional payment<sup>11</sup>. However, payment by payment card will constitute absolute payment<sup>12</sup>.

1 Eg a banker's confirmed credit: see CHOSER IN ACTION vol 13 (2009) PARA 5.

2 As to what constitutes legal tender see para 975 post.

3 As to negotiable instruments generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1400 et seq.

4 In *Gordon v Strange* (1847) 1 Exch 477 the debtor, in answer to a letter demanding payment, sent a Post Office order in which the creditor was described by a wrong forename, and the creditor kept the order but did not cash it, though he was informed by the Post Office that he might do so at any time on signing in the name of the payee. It was held that there was no payment, the debtor having no right to require the creditor to sign any other than his true name or to be at the trouble of returning the order. For regulations relating to money orders and postal orders see POST OFFICE.

5 *Goldshede v Cottrell* (1836) 2 M & W 20; *Re Boys, Eedes v Boys, ex p Hop Planters Co* (1870) LR 10 Eq 467; *Palmer v Bramley* [1895] 2 QB 405, CA.

6 *Smith v Ferrand* (1827) 7 B & C 19; *Sayer v Wagstaff, Re Sanders, ex p Wagstaff* (1844) 14 LJ Ch 116; *Sibree v Tripp* (1846) 15 M & W 23; *Caine v Coulton* (1863) 1 H & C 764.

7 See further paras 952-953 post. Where the instrument is taken in conditional payment it affords a good defence to an action brought before it matures: *Felix Hadley & Co Ltd v Hadley* [1898] 2 Ch 680; *Allen v Royal Bank of Canada* (1925) 95 LJPC 17.

8 See para 954 post.

9 *Re Romer and Haslam* [1893] 2 QB 286, CA; *Bolt and Nut Co (Tipton) Ltd v Rowlands, Nicholls & Co Ltd* [1964] 2 QB 10 at 21, [1964] 1 All ER 137 at 142, CA, per Danckwerts LJ.

10 See para 754 ante; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 375 et seq. As to letters of credit see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 923 et seq.

11 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 212, [1972] 2 All ER 127 at 139, CA, obiter per Lord Denning MR and at 221 and at 147 per Stephenson LJ; applied in *Ng Chee Chong, Ng Weng*

*Chong, Ng Chenc and Ng Yew (a firm t/a Maran Road Saw Mill) v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep 156.

12 See para 945 ante.

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### **952. Conditional payment: effect if instrument paid.**

Where a cheque or negotiable instrument is taken as a conditional payment<sup>1</sup> the legal effect of the transaction is that the original debt remains, but the remedy for it is suspended until the maturity of the instrument in the hands of the creditor<sup>2</sup>. If the instrument is paid when it becomes due, this is equivalent to payment of the original debt<sup>3</sup>; and if it is paid in part the original debt is discharged pro tanto<sup>4</sup>. However, the creditor does not lose his rights against the debtor by taking a bill or note from the debtor's agent<sup>5</sup>; but he will do so where the third party first offered cash<sup>6</sup>.

Cheque guarantee cards<sup>7</sup> are designed for use where the card-holder pays a retailer for goods or services by cheque<sup>8</sup>. The dangers to the retailer are that the presenter of the cheque (1) has insufficient funds in his bank account to meet the cheque; or (2) has forged the signature of the signatory to the bank account. To lessen these risks, bankers supply to their customers cheque guarantee cards. Proffered with the card-holder's cheque to the retailer, such cards purport to be an offer by the banker that, subject to the terms set out on the guarantee card, the banker will guarantee that the cheque will be met<sup>9</sup>. The situation where the cheque is forged is dealt with below<sup>10</sup>.

1 *Sayer v Wagstaff, Re Sanders, ex p Wagstaff* (1844) 14 LJ Ch 116; *Belshaw v Bush* (1851) 11 CB 191; *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491; *Currie v Misa* (1875) LR 10 Exch 153 (affd sub nom *Misa v Currie* (1876) 1 App Cas 554, HL); *Re Matthew, ex p Matthew* (1884) 12 QBD 506, CA; *Elwell v Jackson* (1885) 1 TLR 454, CA. Where bills were given to a solicitor for the amount of his bill of costs, and he gave a receipt 'in settlement', it was held that, some of the bills having been dishonoured, the onus was on the solicitor to show that they were taken in satisfaction of the debt, in order to preclude the client from taxing the bills of costs: *Re Romer and Haslam* [1893] 2 QB 286, CA; *Re Harries* (1844) 13 M & W 3. A conditional payment does not affect a lien of the creditor for the debt, unless it is shown that he took the instrument with the intention of waiving the lien: *Re London, Birmingham and South Staffordshire Bank* (1865) 34 LJ Ch 418.

2 *Allen v Royal Bank of Canada* (1925) 95 LJPC 17; *Bolt and Nut Co (Tipton) Ltd v Rowlands, Nicholls & Co Ltd* [1964] 2 QB 10, [1964] 1 All ER 137, CA (creditor seeking to sign judgment in default after accepting cheque). If the bill or note is given not by the debtor but by a third person, the action for the original debt is equally suspended: *Allen v Royal Bank of Canada* supra.

3 *Felix Hadley & Co v Hadley* [1898] 2 Ch 680; *Thorne v Smith* (1851) 10 CB 659. Payment of the instrument will be presumed, in an action for recovery of the debt, until the contrary is proved: *Hebden v Hartsink* (1801) 4 Esp 46; *Mercer v Cheese* (1842) 4 Man & G 804. If a cheque is accepted and met, payment is deemed to be made at the date of handing over the cheque: *Felix Hadley & Co v Hadley* supra; *Marreco v Richardson* [1908] 2 KB 584 at 593, CA, per Farwell LJ; *Ullrich v IRC* [1964] NZLR 386.

4 *Bottomley v Nuttall* (1858) 5 CBNS 122.

5 *Robinson v Read* (1829) 9 B & C 449.

6 *Marsh v Pedder* (1815) 4 Camp 257; *Smith v Ferrand* (1827) 7 B & C 19; cf *Strong v Hart* (1827) 6 B & C 160; *Anderson v Hillies* (1852) 12 CB 499.

7 As to cheque guarantee cards see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 903.

8 Most cheques will be non-negotiable: see the Cheques Act 1992; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 898, 1411, 1499.

9 See para 953 post. As to such unilateral offers see generally para 657 ante.

10 See para 955 post.



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### 953. Conditional payment: instrument dishonoured.

If a negotiable instrument<sup>1</sup> taken in conditional payment is dishonoured, payment of the original debt may be enforced as if no instrument had been taken<sup>2</sup>, unless the instrument has been negotiated and at the time of action is outstanding in the hands of a third party, in which case the creditor's remedy continues to be suspended<sup>3</sup>. Where the debtor is primarily liable on an instrument given by way of conditional payment, it lies on him to prove any circumstance which he wishes to rely upon as excusing him from payment<sup>4</sup>. However, where the debtor is only secondarily liable on it, the creditor must take whatever steps are necessary to obtain payment, and to preserve his remedy against the other parties, by giving due notice of dishonour<sup>5</sup> or otherwise; and, if by reason of his neglect to do so the debtor's position is prejudiced, the debtor is discharged from liability both on the instrument and in respect of the original debt<sup>6</sup>. It is not necessary that notice of dishonour should be given to the debtor unless he is a party to the instrument<sup>7</sup> or there are special circumstances rendering the notice of dishonour necessary in the particular case<sup>8</sup>.

Where a cheque<sup>9</sup> or other instrument payable on demand is taken in conditional payment, it is the duty of the creditor to present it within a reasonable time and, if the debtor is prejudiced by reason of his failure to do so, he is discharged from liability<sup>10</sup>. Where the creditor accepts a cheque guarantee card with the cheque, then upon dishonour of the cheque he may sue on the guarantee<sup>11</sup>.

1 This is unlikely to include a post-1992 cheque, as most such cheques are non-negotiable: see the Cheques Act 1992; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 898, 1411, 1499.

2 *Sayer v Wagstaff, Re Sanders, ex p Wagstaff* (1844) 14 LJ Ch 116; *Cohen v Hale* (1878) 3 QBD 371; *Gunn v Bolckow, Vaughan & Co* (1875) 10 Ch App 491. Where a creditor holds a debtor's acceptance for the price of goods sold and the debtor commits an act of bankruptcy, the creditor is entitled to treat the bill as dishonoured: *Re Raatz, ex p Raatz* [1897] 2 QB 80. As an alternative, the creditor may be able to proceed on the instrument: *Gaynor v McDyer and Hurley* [1968] IR 295. For the position of an auctioneer who sues on a cheque taken as a deposit in a case where the purchaser stops the cheque and repudiates the contract see *Pollway Ltd v Abdullah* [1974] 2 All ER 381, [1974] 1 WLR 493, CA.

3 *Price v Price* (1847) 16 M & W 232; *Davis v Reilly* [1898] 1 QB 1; *Re A Debtor, ex p The Debtor* [1908] 1 KB 344, CA. The creditor is not precluded from suing for the original debt if the dishonoured instrument is outstanding in the hands of a third person as trustee (*National Savings Bank Association v Tranah* (1867) LR 2 CP 556) or agent for him (*Hadwen v Mendisabal* (1825) 10 Moore CP 477) or if, although it may have been transferred to a third person, it is again in the hands of the creditor at the time when the action is brought (*Burden v Halton* (1828) 4 Bing 454; *Tarleton v Allhusen* (1834) 2 Ad & El 32).

4 *Price v Price* (1847) 16 M & W 232; *National Savings Bank Association Ltd v Tranah* (1867) LR 2 CP 556.

5 As to notice of dishonour see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1524-1536.

6 *Bridges v Berry* (1810) 3 Taunt 130; *Soward v Palmer* (1818) 8 Taunt 277; *Camidge v Allenby* (1827) 6 B & C 373; *Robson v Oliver* (1847) 10 QB 704. This is the case even if the bill was taken by way of collateral security (as to which see para 954 post) only: *Peacock v Pursell* (1863) 14 CBNS 728. The debtor is also discharged if the bill is altered by the creditor in such a manner that the debtor's rights on it are affected: *Alderson v Langdale* (1832) 3 B & Ad 660; and see para 1056 et seq post.

7 *Swinyard v Bowes* (1816) 5 M & S 62.

8 *Smith v Mercer* (1867) LR 3 Exch 51.

9 See note 1 *supra*.

10 *Camidge v Allenby* (1827) 6 B & C 373; *Hopkins v Ware* (1869) LR 4 Exch 268; and see *Chamberlyn v Delarive* (1767) 2 Wils 353. As to provisions relating to lost bills of exchange see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1507-1508.

11 *First Sport Ltd v Barclays Bank plc* [1993] 3 All ER 789, [1993] 1 WLR 1229, CA. As to guarantee generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

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**954. Negotiable instrument as collateral security.**

A negotiable instrument may, by agreement, be given only as collateral security for a debt, in which case it leaves untouched the existing remedies for the debt<sup>1</sup>. Such a construction has sometimes been put upon the parties' dealings when the creditor already has better remedies (such as a right of distress) than mere contractual rights<sup>2</sup>.

<sup>1</sup> *Drake v Mitchell* (1803) 3 East 251; *Pring v Clarkson* (1822) 1 B & C 14; *Peacock v Pursell* (1863) 14 CBNS 728; *Modern Light Cars Ltd v Seals* [1934] 1 KB 32.

<sup>2</sup> *Davis v Gyde* (1835) 2 Ad & El 623 (right of distress); *Worthington v Wigley* (1837) 3 Bing NC 454 (right of recourse to other funds under a bond); *Henderson v Arthur* [1907] 1 KB 10 at 13, CA, per Farwell LJ; cf *Palmer v Bramley* [1895] 2 QB 405, CA (acceptance of negotiable instrument sufficient evidence to leave to jury of agreement to forgo right of distress). See also *Re J Defries & Sons Ltd*, *Eichholz v J Defries & Sons Ltd* [1909] 2 Ch 423 (taking of cheque for interest on debenture not acceptance of conditional payment so as to discharge the security or disentitle the debenture holder from claiming, in the event of non-payment of the cheque, as secured creditor against the company in liquidation).

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### **955. Forged, lost or invalid instrument.**

If a document is given in payment which purports to be a bill, note or cheque<sup>1</sup>, but turns out to be a forgery or to be invalid for some other reason, the creditor is entitled to enforce payment of the debt as if no such instrument had been taken by him<sup>2</sup>. If a forged cheque is given with a cheque guarantee card<sup>3</sup>, the bank-guarantor has been held liable on the guarantee where the signature on the cheque was apparently genuine<sup>4</sup>.

Where the creditor loses a bill or note, he must rely on his statutory remedy<sup>5</sup>. If the creditor materially alters a bill drawn by a third party, the position is as follows: the creditor makes the bill his own and, even though dishonoured, it may operate as payment by the debtor<sup>6</sup>; but, if the bill has been accepted by the debtor, a non-fraudulent creditor may still sue the debtor on the original debt, provided the latter has not been prejudiced by the alteration<sup>7</sup>.

<sup>1</sup> Most cheques are non-negotiable: see the Cheques Act 1992; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 898, 1411, 1499.

<sup>2</sup> *Brown v Watts* (1808) 1 Taunt 353; *Cundy v Marriott* (1831) 1 B & Ad 696; *Smart v Nokes* (1844) 6 Man & G 911; *Bell v Buckley* (1856) 11 Exch 631; *Wilson v Vysar* (1812) 4 Taunt 288; *Wilson v Kennedy* (1794) 1 Esp 245; *Ruff v Webb* (1794) 1 Esp 130.

<sup>3</sup> As to cheque guarantee cards see para 952 ante.

<sup>4</sup> *First Sport Ltd v Barclays Bank plc* [1993] 3 All ER 789, [1993] 1 WLR 1229, CA (likely that signature strip replaced and that alteration undetectable).

<sup>5</sup> See the Bills of Exchange Act 1882 s 70; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1507-1508.

<sup>6</sup> *Alderson v Langdale* (1832) 3 B & Ad 660 (the alteration deprived the debtor of his remedy on the bill against the third party); and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1560.

<sup>7</sup> *Atkinson v Hawdon* (1835) 2 Ad & El 628; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1561.

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## (C) APPROPRIATION OF PAYMENTS

### **956. Debtor has first right to appropriate.**

At common law<sup>1</sup>, where several distinct debts are owing by a debtor to his creditor, the debtor has the right when he makes a payment to appropriate the money to any of the debts that he pleases, and the creditor is bound, if he takes the money, to apply it in the manner directed by the debtor<sup>2</sup>. If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor<sup>3</sup>, except where there is an account current<sup>4</sup>.

An appropriation by the debtor need not be made in express terms, but must be communicated to the creditor or be capable of being inferred<sup>5</sup>. It may be inferred, for instance, where the nature of the transaction or the circumstances of the case are such as to show that there was an intention to appropriate<sup>6</sup>.

<sup>1</sup> Where the debts are due under regulated agreements, the position is governed by the Consumer Credit Act 1974 s 81: see CONSUMER CREDIT vol 9(1) (Reissue) para 242.

<sup>2</sup> See the cases cited in note 3 infra. As to guaranteed debts see para 960 post.

<sup>3</sup> *Peters v Anderson* (1814) 5 Taunt 596; *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572 at 608; *Simson v Ingham* (1823) 2 B & C 65; *Croft v Lumley* (1858) 6 HL Cas 672; *The Mecca* [1897] AC 286, HL.

<sup>4</sup> As to account current see para 958 post.

<sup>5</sup> *Leeson v Leeson* [1936] 2 KB 156, [1936] 2 All ER 133, CA; *Stepney Corp v Osofsky* [1937] 3 All ER 289, CA.

<sup>6</sup> *Newmarch v Clay* (1811) 14 East 239 (delivery up of dishonoured bills on receipt of new bills); *Marryatts v White* (1817) 2 Stark 101 (security having been given by a surety for goods to be supplied to his principal and not in respect of previously existing debt, goods were subsequently supplied and payments made by the principal, in respect of some of which discount was allowed for prompt payment; held: it must be inferred that these payments were in liquidation of the secured account); *Shaw v Picton* (1825) 4 B & C 715 (appropriation by debtor inferred from circumstances of payment); *Bardwell v Lydall* (1831) 7 Bing 489 (right of surety to benefit of composition of debts); *Raikes v Todd* (1838) 8 Ad & El 846; *Gee v Pack* (1863) 33 LJQB 49; *Young v English* (1843) 7 Beav 10 (payment of proceeds of sale of mortgaged property held to be made in the mortgage account and not a trade account); *Burn v Boulton* (1846) 2 CB 476 (payments on account, with denial by debtor of the existence of a particular debt); *Nash v Hodgson* (1855) 6 De GM & G 474 (payment of interest held referable to debt not already barred by Statute of Limitations); *Browning v Baldwin* (1879) 40 LT 248 (guaranteed advances by bank); *Lowther v Heaven* (1889) 41 ChD 248, CA (the onus lay on the creditor to show that the debtor had not appropriated any payments in order to entitle the creditor to do so); cf *R v Miskin Lower, Glamorganshire, Justices, ex p Young* [1953] 1 QB 533, [1953] 1 All ER 495 (payments by husband under maintenance order appropriated to arrears in respect of which committal order had been made and not to current payments). In the absence of appropriation by either debtor or creditor, in the case of an interest-bearing debt, prima facie payment is first applied to discharging the interest: *Income Tax Comr v Maharajahdiraja of Darbhanga* (1933) LR 60 IA 146 at 157.

## **UPDATE**

### **956 Debtor has first right to appropriate**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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### **957. Right of creditor to appropriate.**

Where the right of appropriation devolves upon the creditor<sup>1</sup>, he is not bound to make his election at once. The right of appropriation may be exercised by him at any time up to the very last moment<sup>2</sup>, that is, until he has finally exercised the right or something has happened which would render it inequitable for him to exercise it<sup>3</sup>.

The election need not be made in express terms; it may be declared by bringing an action or in any other way that shows the creditor's intention<sup>4</sup>. If the creditor makes an appropriation and communicates it to the debtor, or otherwise indicates that he has made his election, he is irrevocably bound by his decision, and cannot afterwards vary the appropriation<sup>5</sup>; but it has been held that entries made by the creditor in his books are not binding on him as showing that he has made his election unless they have been communicated by him to the debtor<sup>6</sup>.

A creditor can appropriate a payment to a debt which is barred by lapse of time, or which is unenforceable because of some formal defect in the contract upon which it arises<sup>7</sup>, but not to a debt which is illegal or to a claim which does not constitute a legal or equitable demand<sup>8</sup>.

Where a creditor makes an appropriation in part payment of a debt barred by lapse of time, such part payment does not operate to defeat the operation of the statutory bar with regard to the unpaid portion of the debt<sup>9</sup>.

A secured creditor may appropriate payments to a non-preferential part of his claim<sup>10</sup>.

1 See para 956 ante.

2 In *Seymour v Pickett* [1905] 1 KB 715, CA, it was held that the creditor was entitled to exercise his right of appropriation in the course of the trial of an action, there having been no proceeding in the action amounting to an exercise of the right.

3 *The Mecca* [1897] AC 286, HL; *Smith v Betty* [1903] 2 KB 317, CA; *Seymour v Pickett* [1905] 1 KB 715, CA.

4 *The Mecca* [1897] AC 286, HL; *Stepney Corp'n v Osofsky* [1937] 3 All ER 289, CA.

5 *Smith v Betty* [1903] 2 KB 317 at 324, CA; *Friend v Young* [1897] 2 Ch 421; *Hooper v Keay* (1875) 1 QBD 178; *Albemarle Supply Co Ltd v Hind & Co* [1928] 1 KB 307, CA.

6 *Simson v Ingham* (1823) 2 B & C 65; *The Mecca* [1897] AC 286, HL; *London and Westminster Bank v Button* (1907) 51 Sol Jo 466. See, however, *Deeley v Lloyds Bank Ltd* [1912] AC 756 at 783-784, HL (where Lord Shaw quoted with approval the statement of Eve J in that case, that 'if there is nothing more than this, that there is a current account left by the creditor, or a particular account is kept by the creditor, and he carries the money to that particular account, then the court concludes that the appropriation has been made, and, having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation').

7 *Bosanquet v Wray* (1815) 6 Taunt 597; *Cruickshanks v Rose* (1831) 1 Mood & R 100 (debt due for liquor supplied in quantities contravening statute); *Mills v Fowkes* (1839) 5 Bing NC 455 (statute-barred debt); *Seymour v Pickett* [1905] 1 KB 715, CA (unqualified dentist held entitled to appropriate payment towards charges which he was not legally entitled to enforce owing to his not being qualified); *Arnold v Poole Corp'n* (1842) 4 Man & G 860 (appropriation to fees of a solicitor which were not recoverable for want of a retainer by deed); *Stepney Corp'n v Osofsky* [1937] 3 All ER 289, CA (charges by local authority for services which were irrecoverable through lapse of time). A payment cannot be appropriated to a statute-barred debt after an action has been brought and judgment given directing an account to be taken of the amount due, excluding the statute-barred items: *Smith v Betty* [1903] 2 KB 317, CA.

8     *Wright v Laing* (1824) 3 B & C 165 (money lent on usurious contract); *Lamprell v Billericay Union* (1849) 3 Exch 283 (builder's claim for extra works not authorised in writing by the architect as required by the contract); *Keeping v Broom* (1895) 11 TLR 595 (debt incurred during minority); *A Smith & Son (Bognor Regis) Ltd v Walker* [1952] 2 QB 319, [1952] 1 All ER 1008, CA (instalments in respect of partly unlicensed building contracts).

9     *Friend v Young* [1897] 2 Ch 421. See further LIMITATION PERIODS vol 68 (2008) PARA 1207.

10    *Re William Hall (Contractors) Ltd* [1967] 2 All ER 1150, [1967] 1 WLR 948.



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### 958. Account current.

Prima facie, the right of appropriation by the creditor does not arise in the case of an account current, that is to say, where there is one entire account into which all receipts and payments are carried in order of date, so that all sums paid in form one blended fund<sup>1</sup>. In such a case the presumption is that the first item on the debit side of the account is intended to be discharged or reduced by the first item on the credit side, and that the various items are appropriated in the order in which the receipts and payments are set against each other in the account<sup>2</sup>.

This presumption, however, may be rebutted by evidence of an agreement to the contrary or of circumstances from which a contrary intention is to be inferred<sup>3</sup>; and it has no application where the moneys paid to the account are in part the payer's own money and in part moneys held by him as a trustee; in such a case the sums on the debit side are applied in reduction of his own moneys whenever they may have been paid in<sup>4</sup>. As between two or more beneficiaries under different trusts, however, where the moneys belonging to the trustee personally are not sufficient to satisfy the sums drawn out, the ordinary rule applies<sup>5</sup>, except where this would be impracticable or injustice would result between creditors<sup>6</sup>.

1 *Field v Carr* (1828) 5 Bing 13; *Bodenham v Purchas* (1818) 2 B & Ald 39; *Hooper v Keay* (1875) 1 QBD 178.

2 *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572 at 608; *Bodenham v Purchas* (1818) 2 B & Ald 39; *Brook v Enderby* (1820) 2 Brod & Bing 70; *Simson v Ingham* (1823) 2 B & C 65; *Williams v Rawlinson* (1825) 3 Bing 71; *Sterndale v Hankinson* (1827) 1 Sim 393; *Field v Carr* (1828) 5 Bing 13; *Copland v Toulmin* (1840) 7 Cl & Fin 349, HL; *Geake v Jackson* (1867) 36 LJCP 108; *Re Devonport and South Devon Steam Flour Mill Co, Bateman's Case* (1873) 42 LJ Ch 577; *Hooper v Keay* (1875) 1 QBD 178; *London and County Banking Co v Ratcliffe* (1881) 6 App Cas 722, HL; *Re Stenning, Wood v Stenning* [1895] 2 Ch 433; *Egg v Craig* (1903) 89 LT 41; *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; *Re Footman Bower & Co Ltd* [1961] Ch 443, [1961] 2 All ER 161; *Re Yeovil Glove Co Ltd* [1965] Ch 148, [1964] 2 All ER 849, CA; *Re James R Rutherford & Sons Ltd* [1964] 3 All ER 137, [1964] 1 WLR 1211. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 873 et seq.

3 *Henniker v Wigg* (1843) 4 QB 792; *City Discount Co Ltd v McLean* (1874) LR 9 CP 692, ExCh; *Browning v Baldwin* (1879) 40 LT 248; *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696 at 726, CA; *The Mecca* [1897] AC 286, HL; *Re British Red Cross Balkan Fund, British Red Cross Society v Johnson* [1914] 2 Ch 419; *Re Hodgson's Trusts, Public Trustee v Milne* [1919] 2 Ch 189; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60.

4 *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA; *Spartali v Crédit Lyonnais* (1885) 2 TLR 178, CA; *Re Wreford, Carmichael v Rudkin* (1897) 13 TLR 153; and see TRUSTS.

5 *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696 at 704, CA, per Fry J; *Re Stenning, Wood v Stenning* [1895] 2 Ch 433; *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 553, 554, [1948] 2 All ER 318 at 364, CA (affd without reference to this point sub nom *Ministry of Health v Simpson* [1951] AC 251, [1951] 2 All ER 1137, HL); and see *Mutton v Peat* [1899] 2 Ch 556 at 560 (revsd on the facts [1900] 2 Ch 79, CA); *Favenc v Bennett* (1809) 11 East 36.

6 *Barlow Clowes International Ltd (in liquidation) v Vaughan* [1992] 4 All ER 22, CA.

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### **959. Compositions.**

Where a creditor has agreed to accept a composition<sup>1</sup> payable by instalments in discharge of several debts, an instalment paid under the agreement is to be taken as a payment made in respect of all the debts rateably<sup>2</sup>, even though the whole of the composition is not paid and the creditor is restored to his former rights<sup>3</sup>.

1 As to compositions with creditors see *Re Hatton* (1872) 7 Ch App 723; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 863. See also paras 1048-1051 post.

2 Including where there is a surety: see para 960 post.

3 *Thompson v Hudson* (1871) 6 Ch App 320.

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## **960. Guaranteed debt.**

Where one of the debts is guaranteed by a surety and another is not, the mere fact of suretyship does not deprive the debtor or the creditor of the power of appropriation<sup>1</sup>, and the surety has no right to insist on the appropriation of any payment to the guaranteed debt unless the circumstances of the case are such as to show that this was intended<sup>2</sup>.

<sup>1</sup> *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Williams v Rawlinson* (1825) 3 Bing 71; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

<sup>2</sup> *Pearl v Deacon* (1857) 1 De G & J 461; *Kinnaird v Webster* (1878) 10 ChD 139; *Plomer v Long* (1816) 1 Stark 153; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA. In *Wright v Hickling* (1866) LR 2 CP 199, it was held that a surety who had guaranteed payment of a promissory note given by a member to a loan club was not entitled to have the subscription of the debtor applied in reduction of his liability. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq. As to the right of the surety to the benefit of a composition (see paras 1048-1051 post) paid by the debtor in respect of all his debts see *Martin v Brecknell* (1813) 2 M & S 39; *Bardwell v Lydall* (1831) 7 Bing 489; *Raikes v Todd* (1838) 8 Ad & El 846; *Gee v Pack* (1863) 33 LJQB 49; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

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## **(ii) Non-performance as a Bar to Enforcement of Contract**

### **A. INTRODUCTION**

#### **961. General rule.**

Whenever one party to a contract fails to fulfil his obligation under the contract, the question arises whether this failure constitutes a bar to his enforcement of the other party's obligation<sup>1</sup>. This problem may arise either as a result of an event for which the non-performing party is not responsible (in which case the matter will be dealt with under the doctrine of impossibility or frustration<sup>2</sup>) or as a result of a breach of contract by him (in which case he will anyway be liable in damages<sup>3</sup>). The question which must be determined is whether the performance<sup>4</sup> or tender of performance<sup>5</sup> by one party is a condition<sup>6</sup> of the duty of performance by the other party; or, in other words, whether one duty is dependent upon the fulfilment of the other, or whether it must be performed in any event<sup>7</sup>.

1 The non-performance may be of such a character that the other party is altogether discharged from further liability under the contract; alternatively, his obligations may only be suspended until the requisite performance is completed. As to discharge of contracts as a result of breach see para 989 et seq post.

2 *Poussard v Spiers and Pond*(1876) 1 QBD 410. See paras 888-919 ante.

3 See para 1012 post.

4 See paras 966-970 post.

5 See paras 971-978 post.

6 For the various meanings of 'condition' see *L Schuler AG v Wickman Machine Tool Sales Ltd*[1974] AC 235, [1973] 2 All ER 39, HL; and see further paras 962, 993-994 post.

7 See *Wickman Machine Tool Sales Ltd v L Schuler AG*[1972] 2 All ER 1173 at 1188, [1972] 1 WLR 840 at 859, CA, per Stephenson LJ; affd sub nom *Schuler AG v Wickman Machine Tool Sales Ltd*[1974] AC 235, [1973] 2 All ER 39, HL.

### **UPDATE**

#### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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## **B. THE NATURE OF CONDITIONS PRECEDENT**

### **962. Conditional promises in general.**

A contractual promise by one party (A) may be either unconditional<sup>1</sup> or conditional. A conditional promise is one where the liability to perform the promise depends upon some thing or event; that is to say, it is one of the terms of the contract that the liability of the party shall only arise, or shall cease, on the happening of some future event, which may or may not happen, or on one of the parties doing or abstaining from doing some act<sup>2</sup>. A promise is not conditional merely because the time for performance is postponed, or because it is only to be performed on the happening of a certain future event (as, for instance, on the death of one of the parties); to constitute a condition there must be contingency as well as futurity<sup>3</sup>. The major categories of conditional promises are<sup>4</sup>: (1) conditions precedent to the formation of the contract<sup>5</sup>; and (2) conditions suspensive of performance<sup>6</sup>.

A condition precedent to the formation of a contract is a conditional promise which should be distinguished from a condition precedent to the performance of the contract<sup>7</sup>. In the former case, no contract comes into existence until the contingency occurs<sup>8</sup>; whereas in the latter case, there is a contract but the obligations of one or both of the parties are suspended<sup>9</sup>.

Where the liability to perform only arises on the happening of the contingency or the performance of the condition, the condition is called a condition precedent<sup>10</sup>; when liability ceases thereon, the condition is called a condition subsequent<sup>11</sup> (as with some take-over bids<sup>12</sup>, or where A has an express right without cause<sup>13</sup> to bring the contract to an end<sup>14</sup>, or to do so by subsequent agreement<sup>15</sup>).

More commonly, performance of a promise is subject to a condition precedent, in which case neither party may waive the condition unless it is exclusively for his benefit<sup>16</sup>. Such conditions precedent to performance may be subject to: (a) a purely contingent condition<sup>17</sup>; or (b) a promissory condition<sup>18</sup>. Where the performance of A's promise is subject to a contingent condition precedent, A is not liable to perform his promise unless that condition occurs<sup>19</sup>, but B does not promise that the condition will occur (as with agreements to sell at a third party valuation<sup>20</sup>, or work done subject to approval<sup>21</sup> or with due diligence<sup>22</sup>). Where the performance of A's promise is subject to a promissory condition, B promises that the condition will occur; A is not liable to perform his promise unless B fulfils his promise<sup>23</sup>; and non-fulfilment of the condition will also lead to B's liability in damages<sup>24</sup>. Not every promise by B will amount to a condition precedent to performance by A<sup>25</sup>. B's promise may be merely a warranty<sup>26</sup> or an innominate term<sup>27</sup>.

It is not necessary, under the modern system of pleading, for a party seeking to enforce a contractual promise to allege the fulfilment of all conditions precedent on his part, though the other party may raise non-fulfilment as a defence<sup>28</sup>. The fact that the parties name a particular term a 'condition'<sup>29</sup> or a 'condition precedent' is persuasive, but not conclusive<sup>30</sup>.

<sup>1</sup> See para 892 ante.

<sup>2</sup> *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at 304, [1952] 1 All ER 970 at 976, CA, per Denning LJ.

3 See the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 224. As to conditions in charterparties, leases, contracts of insurance, contracts for the sale of goods and land see CARRIAGE AND CARRIERS; LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 133; INSURANCE; SALE OF GOODS AND SUPPLY OF SERVICES; SALE OF LAND.

4 It would seem that, wherever the court finds that one or both parties to the contract is under any obligation to take steps to fulfil the condition, or not to prevent the condition being fulfilled (see para 670 ante), this must carry the implication that either (1) the contract is binding and the condition is merely precedent to performance; or (2) there is a collateral contract.

Distinguish conditional acceptances: see para 661 ante.

5 See the text and notes 7-9 infra. One explanation may be that there is in reality only an offer to enter a unilateral contract (see paras 606, 657 ante, 963 note 1 post). See also JC Smith 'Contracts -- Mistake, Frustration and Implied Terms' (1994) 110 LQR 400 at 410.

6 See the text and notes 10-15 infra.

7 See the text to notes 10-27 infra.

8 See eg *Pym v Campbell* (1856) 6 E & B 370; *Bentworth Finance Ltd v Lubert* [1968] 1 QB 680, [1967] 2 All ER 810, CA (hire-purchase of car; finance company failed to deliver log-book; contract did not come into existence until the log-book was delivered). For other examples see para 670 notes 8-23 ante.

9 See eg *Marten v Whale* [1917] 2 KB 480, CA. For examples see para 670 notes 24-43 ante.

10 See eg *Marten v Whale* [1917] 2 KB 480, CA.

11 See eg *Thompson v ASDA-MFI Group plc* [1988] Ch 241, [1988] 2 All ER 722; *Total Gas Marketing Ltd v Arco British Ltd* (1998) Times, 8 June, HL (parties called the provision a 'condition precedent'); cf *Head v Tattersall* (1871) LR 7 Exch 7 (usually cited as an example of a condition subsequent; sed quaere); *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1992] 1 AC 233, [1991] 3 All ER 1, HL (apparently an example of a condition subsequent in an insurance contract, although it was termed a 'warranty', and the House of Lords called it a condition precedent).

12 The common form of 'take-over bid' (ie the offeror offers to purchase shares subject to acceptance by a stated proportion of shareholders) creates a binding contract with anyone who accepts, subject to power in the offeror to resile from the contract if the stated proportion of acceptances is not reached: *Ridge Nominees Ltd v IRC* [1962] Ch 376 at 382, 383, [1961] 2 All ER 354 at 357; revsd on another point [1962] Ch 376 at 394, [1961] 3 All ER 1108, CA. See also *Higgs v Hodge Industrial Securities Ltd* (1966) 111 Sol Jo 14, CA.

13 Distinguish: (1) contracts which come to an end upon frustration (see para 897 et seq ante); and (2) contracts which come to an end on breach (see para 1002 et seq post).

14 See *Cannon v Miles (t/a Phoenix Motors)* [1974] 2 Lloyd's Rep 129, CA; *Millers Wharf Partnership Ltd v Corinthian Column Ltd* (1990) 61 P & CR 461. For statutory rights to do so see paras 1076-1077 post.

15 See para 1015 notes 3-4 post.

16 *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148; and see para 1027 note 8 post.

17 See the text and notes 19-22 infra.

18 See the text and notes 23-27 infra.

19 *Oval (717) Ltd v Aegon Insurance Co (UK) Ltd* (1997) 54 ConLR 74; and see para 991 post.

20 See paras 963 note 8, 991 note 5 post. It is otherwise where B prevents performance of the condition: see para 968 post.

21 See para 964 post.

22 *Greater London Council v Cleveland Bridge and Engineering Co Ltd* (1984) 8 ConLR 30, (1984) Times, 26 April.

23 *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep 418; and see para 991 post.

24 See para 1012 post. An example would be the opening of a letter of credit by the buyer in an international contract for the sale of goods: see *Pavia & Co SpA v Thurmann-Nielsen*[1952] 2 QB 84, [1952] 1 All ER 492, CA; *Trans Trust SPRL v Danubian Trading Co Ltd*[1952] 2 QB 297, [1952] 1 All ER 970, CA; *AE Lindsay & Co Ltd v Cook* [1953] 1 Lloyd's Rep 328.

25 The old language was to distinguish whether B's promise was 'dependent' or 'independent' of A's promise: see para 966 post.

26 *L Schuler AG v Wickman Machine Tool Sales Ltd*[1974] AC 235, [1973] 2 All ER 39, HL; and see paras 993-994 post.

27 See para 995 post.

28 See RSC Ord 18 r 7(3), (4); *Jefferson v Paskell*[1916] 1 KB 57, CA; but cf *Frühauß v Grosvenor & Co* (1892) 61 LJQB 717, DC. Although an averment of fulfilment of conditions precedent is thus implied, where the defendant raises the issue the burden of proving performance or readiness to perform is on the plaintiff; cf *Bond Air Services Ltd v Hill*[1955] 2 QB 417, [1955] 2 All ER 476 (condition precedent in insurance policy treated in same manner as exception, casting upon insurers onus of proving non-fulfilment). As to the onus of proof in relation to frustration and exclusion clauses see respectively paras 899, 804 ante.

29 As to the use of the expression in an attempt to classify a promise in a contract see para 967 post.

30 *Total Gas Marketing Ltd v Arco British Ltd*(1998) Times, 8 June, HL.

## UPDATE

### 961-978 Non-performance as a Bar to Enforcement of Contract

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 962 Conditional promises in general

NOTE 11--*Total Gas Marketing Ltd*, cited, now reported at [1998] 2 Lloyd's Rep 209.

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### 963. Conditions depending on discretion.

A condition may be subject to an event which is dependent upon the will of one<sup>1</sup> or both<sup>2</sup> of the parties to the contract or of a third person<sup>3</sup>. Where services are performed under an agreement that remuneration shall be in the discretion of the employer, the question whether the employer has the right to determine whether any remuneration shall be paid, so that his decision is a condition precedent to any claim<sup>4</sup>, or whether he merely has the right to fix the amount of the remuneration, is a question of construction and intention in each particular case<sup>5</sup>. If the amount only is left to the decision of the employer, the employee is entitled to be paid a reasonable sum<sup>6</sup>.

Where property (land or goods) is sold at a valuation to be made by specified third persons, their valuation is a condition precedent<sup>7</sup> to a binding agreement and, if for any reason the valuation is not made (for instance because of the death or refusal to act of the valuer of either party, or because of the valuers' disagreement), the agreement is not enforceable, at least whilst the contract remains wholly executory, the court having no power to order a valuation in any other manner than that agreed upon<sup>8</sup>. However, a court might find a contract to pay a reasonable sum where there is a commercial agreement or it is partially executed<sup>9</sup>. Moreover, if the sale is at a fair valuation, no particular mode of arriving at the value being indicated, the court may enforce the contract and direct the mode of valuation<sup>10</sup>.

1 This is the position in the case of an option. Though an option constitutes a binding offer to enter into another contract, it is also a contract in itself and the option holder can only 'perform' by exercising his option. As to options see para 640 ante.

It has sometimes been suggested that there cannot be a valid contract where one party has a complete discretion whether he will perform or not: *Firestone Tyre and Rubber Co v Vokins & Co* [1951] 1 Lloyd's Rep 32 at 39 per Devlin J ('We promise to do a thing, but we are not liable if we do not do it' is not a contract at all'); see also *Taylor v Brewer* (1813) 1 M & S 290 (engagement to work for such remuneration as should be deemed right). This might be because of lack of consideration (see para 727 et seq ante) or lack of intent to enter into legal relations (see para 718 et seq ante). The circumstances might, however, support the implication of a unilateral contract, for the essence of such a contract is that the party doing the act in return for the promise is not bound to do the act (see further paras 606, 657 ante).

Where a party under a contract has a discretion, the exercise of which in a certain way is a condition precedent to his liability, his discretion may not, upon the proper construction of the contract, be unfettered: *Andrews v Belfield* (1857) 2 CBNS 779 (contract for construction of carriage construed as allowing buyer to reject so long as he was acting bona fide and not out of mere caprice); see also the cases cited in para 964 notes 1-2 post.

2 There may be a valid contract determinable at the discretion of one or both parties: *Souch v Strawbridge* (1846) 2 CB 808. As to notice see para 982 et seq post.

3 See the cases cited in note 8 infra.

4 The discretion may relate to payment of a bonus, so that no question arises of the existence of a contract of employment: see *Powell v Braun* [1954] 1 All ER 484, [1954] 1 WLR 401, CA. Otherwise there might be no contract at all.

5 *Powell v Braun* [1954] 1 All ER 484, [1954] 1 WLR 401, CA.

6 *Bryant v Flight* (1839) 5 M & W 114; *Bird v M'Gahey* (1849) 2 Car & Kir 707; *Jewry v Busk* (1814) 5 Taunt 302; *Way v Latilla* [1937] 3 All ER 759, HL; *Powell v Braun* [1954] 1 All ER 484, [1954] 1 WLR 401, CA; cf *Taylor v Brewer* (1813) 1 M & S 290; *Roberts v Smith* (1859) 4 H & N 315. See further AGENCY vol 1 (2008) PARA 101; EMPLOYMENT.



7 See para 962 ante.

8 *Emery v Wase* (1803) 8 Ves 505; *Milnes v Gery* (1807) 14 Ves 400; *Firth v Midland Rly Co* (1875) LR 20 Eq 100.

If the valuer appointed by the contract is willing to act, the court will compel the party in possession of the property to permit the valuation to be made: *Smith v Peters* (1875) LR 20 Eq 511. Where the valuer is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault: see the Sale of Goods Act 1979 s 9(2); para 969 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 61.

9 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL; and see paras 674-675 ante. See also the Sale of Goods Act 1979 s 9(1) (which provides that, if the goods or any part of them have been delivered to and appropriated by the buyer, he must pay a reasonable price for them); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 60. The same principles apply to an agreement for the valuation of dilapidations: *Babbage v Coulburn* (1882) 9 QBD 235, CA.

10 *Milnes v Gery* (1807) 14 Ves 400.

## UPDATE

### 961-978 Non-performance as a Bar to Enforcement of Contract

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 963 Condition depending on discretion

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 8--See *Gillatt v Sky Television Ltd (formerly Sky Television plc)* [2000] 1 All ER (Comm) 461, CA (provision for appointment of independent chartered accountant could not be usurped by the court).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/B. THE NATURE OF CONDITIONS PRECEDENT/964. Conditions as to approval.

#### **964. Conditions as to approval.**

Where the condition is that work is to be done to the satisfaction of one of the parties to the contract, this will, as a rule, be construed to mean reasonably to his satisfaction, so that if his approval could not reasonably be withheld the condition is satisfied<sup>1</sup>; but the language of the contract may be such that he is at liberty to decide the question without reference to reasonable cause, in which case his decision can only be impugned on the ground of a want of good faith<sup>2</sup>.

Where the work is to be done to the satisfaction of a third person, no requirement that his decision must be reasonable will be implied; and his refusal to approve the work is conclusive, unless it can be shown that he is acting in collusion with the other party to the contract<sup>3</sup>. But where the approval to be obtained is that of an employee or agent of a party to the contract then, unless the language of the contract is such as to allow other than a reasonable decision, that party will be responsible for seeing to it that the employee or agent exercises his judgment and does so reasonably<sup>4</sup>.

1 *Dallman v King* (1837) 4 Bing NC 105; *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782; *Docker v Hyams* [1969] 3 All ER 808, [1969] 1 WLR 1060, CA; cf *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] AC 684, [1960] 2 All ER 100, PC (clause 'subject to shipment' construed as meaning subject to available supplies, not subject to vendors taking decision to ship).

2 *Andrews v Belfield* (1857) 2 CBNS 779; *Stadhard v Lee* (1863) 3 B & S 364; *Diggle v Ogston Motor Co* (1915) 84 LJB 2165. For the effect of such conditions as 'subject to satisfactory finance' see para 670 ante.

3 *Worsley v Wood* (1796) 6 Term Rep 710 (refusal to give certificate, production of which was a condition of a policy of insurance); *Clarke v Watson* (1865) 18 CBNS 278 (architect's certificate under a building contract); *Smith v Howden Union Rural Sanitary Authority and Fowler* (1890) 2 Hudson's BC (4 Edn) 156: see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 92 et seq. See also *Caney v Leith* [1937] 2 All ER 532.

4 *AF Trading (London) Ltd v Effra Sales and Service Ltd* [1953] 2 Lloyd's Rep 747 (the person giving approval was in fact the agent of a third party but, since that party was the ultimate buyer in a chain of contracts, the agent was treated as agent, for this occasion, of the defendant).

#### **UPDATE**

#### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/B. THE NATURE OF CONDITIONS PRECEDENT/965. Notice.

### **965. Notice.**

Where a promise is conditional upon the happening of a particular event, and there is no express stipulation that notice is to be given of the happening of the event<sup>1</sup>, a condition to that effect will not, as a rule, be implied<sup>2</sup>. However, such an implication will be made where the nature of the contract requires it: for instance, where the event is a matter which lies within the peculiar knowledge of the other party to the contract or depends upon an option to be exercised by him<sup>3</sup>, as where a landlord agrees to repair the inside of a house<sup>4</sup>, or keep the drains or outside walls in repair<sup>5</sup>. In the case of an alternative promise, where the right of electing the alternative which is to be performed rests with the promisee, notice must be given by him of the mode in which the option has been exercised<sup>6</sup>.

1 As to notice of dishonour of a bill see the Bills of Exchange Act 1882 ss 48, 49; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1524 et seq.

2 *Vyse v Wakefield* (1840) 6 M & W 442 (affd 7 M & W 126, Ex Ch); *Murphy v Hurly* [1922] 1 AC 369, HL.

3 *Makin v Watkinson* (1870) LR 6 Exch 25; *London and South Western Rly Co v Flower* (1875) 1 CPD 77 at 85; *Manchester Bonded Warehouse Co v Carr* (1880) 5 CPD 507.

4 *Makin v Watkinson* (1870) LR 6 Exch 25; *Broggi v Robins* (1899) 15 TLR 224, CA; *Tredway v Machin* (1904) 91 LT 310, CA.

5 *Hugall v M'Lean* (1885) 53 LT 94, CA; *Torrens v Walker* [1906] 2 Ch 166.

6 See para 925 ante.

### **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/C. PROMISES AS CONDITIONS PRECEDENT/966. Nature of mutual promises.

### **C. PROMISES AS CONDITIONS PRECEDENT**

#### **966. Nature of mutual promises.**

Where a contract consists of mutual promises, these may be independent, dependent, or concurrent<sup>1</sup>. Where the promises are independent, the breach of one of them gives the other party a right of action for damages only, and he is bound to perform his part of the contract<sup>2</sup>. Where the promises are dependent, due performance by one party of his promise is a condition precedent<sup>3</sup> to the liability of the other party to perform his promise, and the non-performance of such a condition precedent releases the other party from his obligation to perform the contract<sup>4</sup>, unless he has received a substantial part of the consideration for his promise<sup>5</sup>, or unless he has in some way lost the right to rescind<sup>6</sup>, in which cases he can only recover damages for breach of the other's promise. Where the promises are concurrent, the effect is to bind each party to be ready and willing to perform his promise on tender of performance by the other party<sup>7</sup>.

1 More modern terminology is to describe 'dependent' and 'independent' promises as 'conditions' and 'warranties': see para 967 post.

2 *Fearon v Earl of Aylesford*(1884) 14 QBD 792, CA (separation deed; covenant by husband to pay maintenance to wife independent of wife's non-molestation covenant). A tenant's covenant to pay rent is independent of the landlord's covenant to repair: *Taylor v Webb*[1937] 2 KB 283, [1936] 2 All ER 763 (revsd on other grounds [1937] 2 KB 283 at 290, [1937] 1 All ER 590, CA).

3 See para 962 ante.

4 *Bryant v Beattie* (1838) 5 Scott 751; *Coombe v Greene* (1843) 11 M & W 480; *Ellen v Topp*(1851) 6 Exch 424, Ex Ch; *Leakey v Lucas* (1863) 14 CBNS 491; *General Billposting Co Ltd v Atkinson*[1909] AC 118, HL; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep 418.

5 *White v Beeton* (1861) 7 H & N 42; *Behn v Burness* (1863) 3 B & S 751, Ex Ch; *Pust v Dowie* (1865) 5 B & S 33; *Carter v Scargill*(1875) LR 10 QB 564; *Meyrick v Dyson* (1925) 41 TLR 368. See also para 924 ante.

6 See paras 1010-1011 post.

7 See eg the Sale of Goods Act 1979 s 28 (delivery of goods and payment of the price concurrent conditions unless otherwise agreed; see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 162); *Newgass v Bottomley* (1903) 19 TLR 309 (undertaking to pay debt of third party against delivery of all securities held by the creditor).

### **UPDATE**

#### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/C. PROMISES AS CONDITIONS PRECEDENT/967. Criteria for determining whether promises independent or dependent.

### 967. Criteria for determining whether promises independent or dependent.

The question whether the promise of one party is a condition precedent<sup>1</sup> to the liability of the other party or is independent<sup>2</sup> is to be determined by the intention of the parties as appearing from the terms of the contract and the surrounding circumstances<sup>3</sup>; and, in the case of a written contract, this depends upon the construction of the contract taken as a whole<sup>4</sup>. The test applied is whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the party in default a thing different in substance from what the other party has stipulated for; or whether it merely partially affects it and may be compensated for in damages<sup>5</sup>. The modern terminology for these two categories is often 'conditions' and 'warranties' <sup>6</sup>.

Certain stipulations are categorised by statute<sup>7</sup> or by the common law<sup>8</sup> as going or not going to the root of the contract, but such categorisations usually<sup>9</sup> yield to any contrary intention of the parties, who are free to allot such consequences as they wish to the non-fulfilment of a particular stipulation<sup>10</sup>.

<sup>1</sup> See para 962 ante.

<sup>2</sup> For the distinction between 'dependent' and 'independent' promises see para 966 ante.

<sup>3</sup> *Pordage v Cole* (1669) 1 Wms Saund 319; *Hotham v East India Co* (1787) 1 Term Rep 638; *Stavers v Curling* (1836) 3 Bing NC 355; *Bettini v Gye* (1876) 1 QBD 183; *Bastin v Bidwell* (1881) 18 ChD 238; *Bentsen v Taylor Sons & Co (2)* [1893] 2 QB 274 at 281, CA, per Bowen LJ; *Kidston & Co v Monceau Ironworks Co* (1902) 86 LT 556; *Roberts v Brett* (1865) 11 HL Cas 337; *Bank of China, Japan and The Straits v American Trading Co* [1894] AC 266, PC; *Kidner v Stimpson* (1918) 35 TLR 63, CA; *Huntoon Co v Kolynos (Inc)* [1930] 1 Ch 528, at 557, CA; *Luis de Ridder Limitada v Andre & Cie* [1941] 1 All ER 380. In some of the older cases, there was a tendency to construe promises as being independent, contrary to the intention of the parties: *Glazebrook v Woodrow* (1799) 8 Term Rep 366 at 371 per Grose J. As to the distinction between dependent and independent covenants see further *Pordage v Cole* (1669) 1 Wms Saund 319; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 267.

<sup>4</sup> For examples of the construction of such stipulations see also *Cooper v London, Brighton and South Coast Rly Co* (1879) 4 Ex D 88; *Collins v Locke* (1879) 4 App Cas 674, PC; *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA; *Edge v Boileau* (1885) 16 QBD 117; *Viney v Bignold* (1887) 20 QBD 172. The question whether a promise constitutes a condition precedent when it depends on the construction of a written contract, is one of law for the court: *George D Emery Co v Wells* [1906] AC 515, PC. As to the construction of written contracts see generally para 772 et seq ante.

<sup>5</sup> See *Poussard v Spiers and Pond* (1876) 1 QBD 410 (the inability through illness of singer, engaged to perform in new opera, to appear at the opening and subsequent three performances, was held to go to the root of the whole contract and to justify rescission); cf *Bettini v Gye* (1876) 1 QBD 183 (where it was held that a stipulation as to attendance at rehearsals six days before the commencement of an engagement for 15 weeks to sing at a theatre, and also at concert halls and drawing rooms, was not a condition precedent); *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 443, HL, per Lord Blackburn; *London Guarantee and Accident Co v Fearnley* (1880) 5 App Cas 911, HL (proviso in a fidelity guarantee policy requiring the employer to prosecute the employee in the event of his embezzlement held a condition precedent to a claim on the policy); *Hosking v Pahang Corpn* (1891) 8 TLR 125, CA; *Pennsylvania Shipping Co v Compagnie Nationale De Navigation* [1936] 2 All ER 1167. The rule of construction laid down in the older cases was that where the promises went to the whole of the consideration on both sides they were mutual and dependent conditions; but where they formed part only of the consideration each was an independent promise: *Boone v Eyre* (1779) 1 Hy Bl 273n; *Ellen v Topp* (1851) 6 Exch 424, Ex Ch; *Graves v Legg* (1854) 9 Exch 709.

6 The distinction between conditions and warranties (which involves the same issue but looked at in the context only of promissory stipulations) is considered further in paras 993-994 post.

7 See eg the Sale of Goods Act 1979 ss 12-15A (as amended); the Supply of Goods and Services Act 1982; and SALE OF GOODS AND SUPPLY OF SERVICES.

8 Thus the 'expected ready to load' clause in a charterparty is a condition, breach of which entitles the other party to terminate: *Mardelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalios Angelos* [1971] 1 QB 164 at 183, [1970] 3 All ER 125, CA; and see further CARRIAGE AND CARRIERS vol 7 (2008) PARA 414.

9 There are exceptions: see eg para 819 ante.

10 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 270, 271, [1973] 2 All ER 39 at 62, HL, per Lord Kilbrandon; *Bettini v Gye* (1876) 1 QBD 183 at 187 per curiam.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/C. PROMISES AS CONDITIONS PRECEDENT/968. Partial performance of condition precedent.

**968. Partial performance of condition precedent.**

Partial performance of a condition precedent<sup>1</sup> is not, as a rule, sufficient; but where the contract is divisible, so that it consists in effect of two or more separate obligations, the fact that a condition precedent has not been wholly performed by one party does not relieve the other party to the contract from his obligation to perform that part of the contract in respect of which the condition precedent has been satisfied<sup>2</sup>. Furthermore, in the absence of evidence that the parties have stipulated for exact performance<sup>3</sup>, the condition precedent will usually be fulfilled by substantial, though inexact, performance<sup>4</sup>.

1 See para 962 ante.

2 *Wilson v London, Italian and Adriatic Steam Navigation Co* (1865) LR 1 CP 61 (provision in bill of lading that on ship being ready to unload whole or part of goods, consignee to be ready to receive them from ship was held divisible, and though consignee failed to receive part, shipowner bound to deliver remainder). As to divisible contracts generally see para 922 ante.

3 See para 921 ante.

4 See para 924 ante.

**UPDATE**

**961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

**966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/C. PROMISES AS CONDITIONS PRECEDENT/969. Prevention of performance.

### 969. Prevention of performance.

Where the performance of B's promise to A is subject to a condition precedent<sup>1</sup>, the performance of that condition precedent is excused where B has prevented its performance<sup>2</sup>, or has done something which puts it out of his power to perform his part of the contract<sup>3</sup>, or has intimated that he does not intend to perform his part<sup>4</sup>. In such cases:

- 231 (1) if the condition is promissory, B will have made himself liable for breach of contract<sup>5</sup>; and if it is only a contingent condition, B may be liable for breach of an implied term<sup>6</sup>, this sometimes being wrongly put as falling within the rule that no person can take advantage of his own wrong<sup>7</sup>; and
- 232 (2) B will have dispensed with the performance of any promise by A which was originally a condition to his liability<sup>8</sup>.

<sup>1</sup> See para 962 ante.

<sup>2</sup> *Cort v Ambergate etc Rly Co* (1851) 17 QB 127; *Bradley v Benjamin* (1877) 46 LJQB 590; *Mackay v Dick* (1881) 6 App Cas 251, HL; *Fisher v Drewett* (1878) 48 LJQB 32, CA; *Prickett v Badger* (1856) 1 CBNS 296; *Thomas v Fredricks* (1847) 10 QB 775; *Hayward v Bennett* (1846) 3 CB 404; *Dodd v Churton* [1897] 1 QB 562, CA; *Kleinert v Abosso Gold Mining Co Ltd* (1913) 58 Sol Jo 45, PC; *Eisen v M'Cabe Ltd* 1920 57 SLR 534, HL; *Miguel Mico (London) Ltd v H Widdop & Co Ltd* [1955] 1 Lloyd's Rep 491.

This principle will not allow a seller who has been wrongfully prevented from delivering goods to sue for the price, unless at least the property in the goods has passed: *Colley v Overseas Exporters* [1921] 3 KB 302; and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 287.

<sup>3</sup> As to the doctrine of anticipatory breach see para 1001 post.

<sup>4</sup> As to repudiation see para 997 et seq post.

<sup>5</sup> See eg the Sale of Goods Act 1979 s 9(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 61.

<sup>6</sup> *Bacal Construction (Midlands) Ltd v Northampton Development Corpn* [1976] 1 EGLR 127, CA (implied term); *Thompson v ASDA-MFI Group plc* [1988] Ch 341, [1988] 2 All ER 722 (no implied term).

<sup>7</sup> *Alghussein Establishment v Eton College* [1991] 1 All ER 267, [1988] 1 WLR 587, HL; *Micklefield v SAC Technology Ltd* [1991] 1 All ER 275, [1990] 1 WLR 1002.

<sup>8</sup> *Main's Case* (1596) 5 Co Rep 20b; *Jones v Barkley* (1781) 2 Doug KB 684; *Hotham v East India Co* (1787) 1 Term Rep 638; *Planché v Colburn* (1831) 8 Bing 14 (engagement of plaintiff to write work for publication, and subsequent abandonment of publication); *Pontifex v Wilkinson* (1845) 1 CB 75 (contract to manufacture and fit plant for brewery); *Short v Stone* (1846) 8 QB 358 (promise to marry, and promisor marrying third party); *Caines v Smith* (1846) 15 M & W 189; *Lovelock v Franklyn* (1846) 8 QB 371 (promise to assign, and promisor assigning to third party); *Ripley v M'Clure* (1849) 4 Exch 345 (contract for sale of goods on arrival of ship, and refusal to accept delivery before arrival); *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543, CA (wrongful repudiation of contract for sale of goods by buyer; buyer held to have waived performance of condition precedent on part of sellers); *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48, HL (wrongful repudiation by buyer; sellers not bound to prove they were ready and willing to deliver at date of repudiation); *Sinason-Teicher Inter-American Grain Corpn v Oilcakes and Oilseeds Trading Co Ltd* [1954] 2 All ER 497, [1954] 1 WLR 935 (affd without consideration of this point [1954] 3 All ER 468, [1954] 1 WLR 1394, CA); *Peter Turnbull & Co Pty Ltd v Mundas Trading Co (Australasia) Pty Ltd* [1954] 2 Lloyd's Rep 198 (Aust HC); *UGS Finance Ltd v National Mortgage Bank of Greece and National Bank of Greece SA* [1964] 1 Lloyd's Rep 446, CA; *Rightside Properties Ltd v Gray* [1974] 2 All ER 1169; *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598, CA; *Lusty (David Michael) v Finsbury Securities* (1993) 58 BLR 66, CA,

But if it can be shown that the other party would in any event (and apart from the consequences of his acceptance of a repudiation) have been unable to perform his side of the contract, he will at most be entitled to nominal damages: *Mardelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 [1970] 3 All ER 125, CA.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/C. PROMISES AS CONDITIONS PRECEDENT/970. Demand for performance.

### **970. Demand for performance.**

Generally, no request or demand for performance of a contract is necessary in order to create a right of action for breach<sup>1</sup>, as where there is a promise to pay a sum of money on a specified day<sup>2</sup>. Exceptionally, such a request or demand may be necessary because it is expressly made a condition precedent<sup>3</sup> or the nature of the contract requires such a condition to be implied<sup>4</sup>, as where the amount of the debt is uncertain<sup>5</sup>. A bill of exchange must be duly presented for payment for a right of action to accrue against the drawer or indorser<sup>6</sup>.

1 *Brown v Dean* (1833) 5 B & Ad 848 (undertaking to give a promissory note for composition of the debt of another; no demand for the note necessary); *Radford v Smith* (1838) 3 M & W 254 (contract to redeliver goods in return for power of attorney; no demand necessary); *Fisher v Ford* (1840) 12 Ad & El 654 (contract to build within reasonable time; no necessity for any requisition to build); *Walton v Mascall* (1844) 13 M & W 452 (demand for payment of debt not necessary); *Bell & Co v Antwerp, London and Brazil Line* [1891] 1 QB 103, CA; *Lovelock v Franklyn* (1846) 8 QB 371 (undertaking to assign interest in premises; no demand for assignment necessary). As to presentment for payment of bills of exchange see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1516-1523.

2 *Gibbs and Clayton v Southam* (1834) 5 B & Ad 911; *Walton v Mascall* (1844) 13 M & W 452. As to the unlawful harassment of debtors see para 949 ante.

3 See eg *Rawson v Johnson* (1801) 1 East 203 (contract to deliver on request goods sold). As to conditions precedent see para 962 ante.

4 *Topham v Braddick* (1809) 1 Taunt 572 (goods consigned for sale on commission; demand for an account necessary before an action lies for not accounting).

5 *Brown v Great Eastern Rly Co* (1877) 2 QBD 406, DC (where amount of debt uncertain, demand is necessary).

6 See the Bills of Exchange Act 1882 s 45; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1518 et seq.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/D. TENDER/971. General rule.

## **D. TENDER**

### **971. General rule.**

This paragraph and those following it are concerned with the situation where a promisor (A) cannot perform his promise to the promisee (B) without the concurrence of B<sup>1</sup>, as in the case of a contract to deliver goods, or pay money, to B.

In most such cases<sup>2</sup>, A is freed from liability for non-performance of the contract if he makes an unconditional tender or offer of performance in accordance with the terms of his promise<sup>3</sup> and B refuses to accept performance<sup>4</sup>, provided that the tender is made under such circumstances that the other party has a reasonable opportunity of examining the performance tendered in order to ascertain that it conforms to the contract<sup>5</sup>. The principle of the plea of tender<sup>6</sup> is that the promisor (A) has always been ready and willing to perform the contract, and has in fact performed it as far as he was able, but has been prevented from completely performing it by the refusal of the promisee (B) to accept performance. Thus in a contract for the sale of goods, the seller may be freed from further liability under the contract if the buyer fails to take delivery of the goods<sup>7</sup>.

However, a tender of money does not discharge the debt<sup>8</sup>.

1 In cases where the promise is capable of performance without the concurrence of the promisee but not without the concurrence of a third person which the promisor is unable to obtain, the case would seem to be covered by the doctrine of frustration: see para 897 et seq ante. The old case of *Doughty v Neal* (1699) 1 Saund 215 should not be regarded as laying down any universal rule to the contrary.

2 But not payment of a debt: see para 972 post.

3 For the situation where the tender of performance is not in accordance with the contract and the promisor seeks to be discharged on account of the promisee's repudiation see para 1007 post.

4 *Dixon v Clark* (1848) 5 CB 365 at 377 et seq.

5 *Startup v Macdonald* (1843) 6 Man & G 593 at 610, Ex Ch, per Rolfe B; *Isherwood v Whitmore* (1843) 11 M & W 347. See also the Sale of Goods Act 1979 s 34 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 196, 199.

6 As to the requisites of a valid tender see para 974 et seq post. As to the requirement that tender must be unconditional see para 977 post.

7 This is because the buyer's failure may amount to a breach of condition or repudiation: *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382, sub nom *Gill & Duffus SA v Berger & Co Inc* [1984] 1 All ER 438, HL; and see para 1002 post.

8 See para 972 post.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

**966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/D. TENDER/972. The tender of money.

## **972. The tender of money.**

Unlike other types of tender<sup>1</sup>, where A promises to pay a specific sum of money to B, the debt is not discharged by a tender of payment. However, if B subsequently sues for the debt, an unconditional<sup>2</sup> tender<sup>3</sup> of money<sup>4</sup> by A to B<sup>5</sup>, coupled with continued readiness to pay the debt<sup>6</sup>, is an answer to a subsequent action<sup>7</sup> for non-payment if the amount of the debt is paid into court<sup>8</sup> and operates as a bar to any claim for subsequent interest<sup>9</sup> or damages after tender<sup>10</sup>. A plea of tender is not available where the claim is for unliquidated damages<sup>11</sup>.

1 See para 971 ante.

2 As to what amounts to an unconditional tender see para 977 post.

3 As to the requisites of a valid tender see para 974 post; and as to the defeat of a plea of tender by an unmet demand see para 973 post.

4 As to the tender of currency see para 975 post.

5 As to tender to or by an agent see para 978 post.

6 *Barratt v Gough-Thomas* [1951] 2 All ER 48. See, however, para 969 ante.

7 As to the time of tender see para 976 post.

8 See RSC Ord 22 rr 1,7; CCR Ord 11 rr 1, 7. Payment into court is an essential condition for the defence of tender before action: RSC Ord 18, r 16; CCR Ord 9 r 12. Where money has been paid into court with a plea of tender before action the plaintiff cannot take the money out without an order: see RSC Ord 22 r 4; CCR Ord 11 r 4. If the plea of tender is made out the plaintiff is liable to pay the costs of the action on the ground that it ought never to have been brought: *Griffiths v Ystradyfodwg School Board* (1890) 24 QBD 307. As to payment into court see CIVIL PROCEDURE vol 11 (2009) PARAS 742-744.

9 Where A tenders the amount of principal and interest, the tender does not necessarily stop interest running: *Barratt v Gough-Thomas* [1951] 2 All ER 48.

10 *Norton v Ellam* (1837) 2 M & W 461; *Graham v Seal* (1918) 88 LJ Ch 31, CA.

11 *Dearle v Barrett* (1834) 2 Ad & El 82; *Davys v Richardson* (1888) 21 QBD 202, CA.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/D. TENDER/973. Plea of tender defeated by demand.

### **973. Plea of tender defeated by demand.**

Since the principle of the defence of tender is that A has always been ready and willing to perform his contract<sup>1</sup>, a plea of tender of money will fail if B can show that at any time, whether before or after the tender, a demand for payment or performance was made by him and was not complied with, provided that the demand was made at a time when he had a right to make it and that he did not require payment of a greater amount than was due or performance otherwise than in accordance with the contract<sup>2</sup>; and, where there are joint debtors, it is sufficient if the demand is made to any one of them<sup>3</sup>. But in order that the plea may be defeated by a demand made after the tender, the demand must be made by the creditor himself, or by an agent previously authorised by him<sup>4</sup>. An unauthorised demand cannot be made effective for this purpose by ratification<sup>5</sup>.

1 See para 971 ante.

2 *Poole v Tumbridge* (1837) 2 M & W 223 per Parke B; *Spybey v Hide* (1808) 1 Camp 181; *Rivers v Griffiths* (1822) 5 B & Ald 630; *Cotton v Goodwin* (1840) 7 M & W 147; *Brandon v Newington* (1842) 2 QB 915; *Hesketh v Fawcett* (1843) 11 M & W 356; *Dixon v Clark* (1848) 5 CB 365.

3 *Peirse v Bowles and Spibey* (1816) 1 Stark 323. As to joint promises see further para 1080 et seq post.

4 *Coore v Callaway* (1794) 1 Esp 115; *Coles v Bell* (1809) 1 Camp 478n.

5 *Wade's Case* (1601) 5 Co Rep 114a; *Douglas v Patrick* (1790) 3 Term Rep 683; *Black v Smith* (1791) Peake 121; *Coore v Callaway* (1794) 1 Esp 115; *Dean v James* (1833) 4 B & Ad 546. Cf para 978 note 4 post.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/D. TENDER/974. Requisites of valid tender.

#### **974. Requisites of valid tender.**

The amount<sup>1</sup> tendered ought to be the precise amount that is due. If the debtor tenders a larger amount and does not require change, it is nevertheless a good tender of the amount due<sup>2</sup>. However, if he requires change it is not a good tender, because the creditor is not bound to give change<sup>3</sup>, though he will be deemed to waive the objection if he refuses to accept the tender on some other ground<sup>4</sup>, or wrongfully demands a larger sum<sup>5</sup>.

A tender of part of an entire debt is bad<sup>6</sup>, but if the items of the claim are severable, a tender may be made in respect of separate items, provided it is appropriated by the debtor to the specific items<sup>7</sup>. In such a case, the debtor can appropriate the amount tendered to such items as he pleases, but if he fails to do so at the time of the tender it will not be a valid tender in respect of any of the items, unless it is sufficient to discharge the whole debt<sup>8</sup>. A tender of the balance of a debt after setting off<sup>9</sup>, without the consent of the creditor, the amount of a debt presently due from the creditor to the debtor, is not strictly a legal tender<sup>10</sup>; but it seems that, if the creditor were to refuse to accept the balance so reckoned after it had been paid into court by the debtor<sup>11</sup>, the court might in its discretion award the costs against the creditor<sup>12</sup>. A reduction of the debt to the amount of the tender by a set-off accruing afterwards does not make the tender effectual<sup>13</sup>.

A tender of performance which is not in accordance with the terms of the contract may be withdrawn and may not preclude the promisor from subsequently making, within the time limited, a tender of performance in a proper manner<sup>14</sup>; but this will not be the case where the incorrect tender is to be construed as a repudiation of the contract<sup>15</sup>.

1 As to the requirement that a tender of money must be in legal currency see para 975 post. As to the tender of goods under a contract for sale of goods see *Startup v Macdonald* (1843) 6 Man & G 593, Ex Ch; the Sale of Goods Act 1979 ss 28-32 (s 30 (as amended)); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 196.

2 *Wade's Case* (1601) 5 Co Rep 114a; *Douglas v Patrick* (1790) 3 Term Rep 683; *Black v Smith* (1791) Peake 121; *Dean v James* (1833) 4 B & Ad 546.

3 *Betterbee v Davis* (1811) 3 Camp 70; *Robinson v Cook* (1815) 6 Taunt 336; *Blow v Russell* (1824) 1 C & P 365.

4 *Saunders v Graham* (1819) Gow 121; *Cadman v Lubbock* (1824) 5 Dow & Ry KB 289; *Atkin v Acton* (1830) 4 C & P 208; *Bevans v Rees* (1839) 5 M & W 306.

5 *Black v Smith* (1791) Peake 121.

6 See the cases cited in note 7 infra.

7 *Dixon v Clark* (1848) 5 CB 365; *Read's Trustee in Bankruptcy v Smith* [1951] Ch 439, [1951] 1 All ER 406; *James v Lord Harry Vane* (1860) 2 E & E 883. As to appropriation see para 956 et seq ante.

8 *Hardingham v Allen* (1848) 5 CB 793.

9 As to set-off see generally CIVIL PROCEDURE vol 11 (2009) para 634 et seq.

10 *Searles v Sadgrave* (1855) 5 E & B 639; *Phillpotts v Clifton* (1861) 10 WR 135.

11 As to payment into court see RSC Ord 22; CCR Ord 11; and CIVIL PROCEDURE.



12 See RSC Ord 62 r 9(b); CCR Ord 38 r 1(2), (3); and CIVIL PROCEDURE.

13 *Cotton v Godwin* (1840) 7 M & W 147.

14 *Borrowman v Free* (1878) 4 QBD 500, CA (goods tendered without shipping documents; subsequent valid tender within the time limited by the contract); *Tetley v Shand* (1871) 25 LT 658 (goods tendered without proper shipping marks; subsequent tender of goods properly marked); and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 198.

15 As to repudiation see para 997 et seq post.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **966-974 Nature of mutual promises ... Requisites of valid tender**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/D. TENDER/975. Tender in legal currency.

### 975. Tender in legal currency.

A payment or tender of money must prima facie be made in legal currency<sup>1</sup>. There must be an actual production of money at the time of the tender, unless this is dispensed with by the creditor either expressly or by implication<sup>2</sup>. There may be questions as to what amounts to an actual production of money<sup>3</sup> and whether the creditor has dispensed with its actual production. Thus if the debtor tells the creditor that he has come for the purpose of paying a specified amount, and the creditor says that it is too late, or is insufficient in amount, or otherwise indicates that he will not accept the money, the actual production is thereby dispensed with, and there is a good tender of the amount mentioned by the debtor<sup>4</sup>. However, where there is only an offer to enter a unilateral contract, the act requested being the payment of money, it has been said that the offeror may withdraw at any time unless he has actually taken the money<sup>5</sup>.

A tender by bill or cheque, or notes of a bank other than the Bank of England, is not a legal tender<sup>6</sup>; but, if on such a tender being made the creditor makes no objection to its form but refuses to accept it on the ground that a larger sum is due, or on any other ground, he will be considered to waive the objection to the nature of the tender as regards form<sup>7</sup>. A creditor waives his right to be paid in cash when he asks for payment by way of a cheque<sup>8</sup> or payment card<sup>9</sup>.

1 As to the extent to which coins and Bank of England notes are now legal tender see the Currency and Bank Notes Act 1954 s 1(2); the Coinage Act 1971 s 2 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 797; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1279, 1297.

2 *Thomas v Evans* (1808) 10 East 101; *Glasscott v Day* (1803) 5 Esp 48; *Huxham v Smith* (1809) 2 Camp 19; *Ryder v Lord Townsend* (1825) 7 Dow & Ry KB 119; *Douglas v Patrick* (1790) 3 Term Rep 683.

3 *Alexander v Brown* (1824) 1 C & P 288 (money produced in bundle of notes and amount stated); *Leatherdale v Sweepstone* (1828) 3 C & P 342 (creditor leaving before money produced); *Liddiard v Skelton* (1843) 1 LTOS 143 (statement by debtor that he had a stated sum in his pocket and had come to pay the creditor); *Humphrey v Chapman* (1846) 6 LTOS 413 (certain money produced with statement as to amount offered); *Bishop v Smedley* (1846) 2 CB 90 (statement of willingness to pay, the amount not being then known).

4 *Re Farley, ex p Danks* (1852) 2 De GM & G 936; *Finch v Brook* (1834) 1 Bing NC 253; *Black v Smith* (1791) Peake 121; *Harding v Davies* (1825) 2 C & P 77; *Reay v White* (1833) 1 Cr & M 748; *Douglas v Patrick* (1790) 3 Term Rep 683; *The Norway* (1865) 3 Moo PCCNS 245; *Farquharson v Pearl Assurance Co Ltd* [1937] 3 All ER 124 (valid tender of premium by mortgagee of insurance policy).

5 *Petterson v Pattberg* 248 NY 86, 161 NE 428 (NY CA 1928), obiter per Kellogg J. Cf *Offord v Davies* (1862) 12 CBNS 748. As to revocation by the offeror see para 644 ante.

6 *Re Steam Stoker Co* (1875) LR 19 Eq 416; *Blumberg v Life Interests and Reversionary Securities Corp'n* [1898] 1 Ch 27, CA. Cf *Empresa Cubana De Fletes v Lagonisi Shipping Co Ltd* [1971] 1 QB 488, [1971] 1 All ER 193, CA (where it is said that a banker's payment slip is treated in commercial circles as cash); *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA (charterparty required payment 'in cash' but charterer telexed payment; held: it did not constitute payment when the bank, acting in the ordinary course of business, debited the account of the charterer).

7 *Polglass v Oliver* (1831) 2 Cr & J 15; *Jones v Arthur* (1840) 8 Dowl 442; *Re Steam Stoker Co* (1875) LR 19 Eq 416; *Wright v Reed* (1790) 3 Term Rep 554; *Lockyer v Jones* (1796) Peake 239n; *Tiley v Courtier* (1817) 2 Cr & J 16n; *Re Quebrada Co Ltd, Clarke's Case* (1873) 42 LJ Ch 277; *Johnston v Boyes* [1899] 2 Ch 73. As to waiver see para 1025 et seq post.

8 *Cubitt v Gamble* (1919) 35 TLR 223.

9 As to payment cards see para 945 ante.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/D. TENDER/976. Time of tender.

### **976. Time of tender.**

Where a debt is expressly made payable on a particular day, a valid tender must prima facie be made on that day<sup>1</sup>. Whilst a tender made after the date for payment is not strictly a valid tender<sup>2</sup>, provided it is made before the commencement of an action<sup>3</sup> for the recovery of the debt, it will, as a general rule, have the same effect with regard to interests and costs as a valid tender<sup>4</sup>. However, in the case of a contract for the sale of goods, an invalid tender does not as a rule<sup>5</sup> prevent the seller from subsequently making a valid tender, provided it is made within the time limited for delivery of the goods<sup>6</sup>. Where the owner under a charterparty had an express power to withdraw the vessel on default in payment of hire 'in advance', late tender of payment did not preclude his exercise of that right<sup>7</sup>. Similarly, the acceptor of a time bill<sup>8</sup> cannot make a valid tender after due date<sup>9</sup>.

1 *Dixon v Clark* (1848) 5 CB 365 at 378-379 per Wilde CJ.

2 *Hume v Peploe* (1807) 8 East 168; *Poole v Tumbridge* (1837) 2 M & W 223; *Dixon v Clark* (1848) 5 CB 365; *Dobie v Larkan* (1855) 10 Exch 776.

3 I.e. the issue of the writ. Even thereafter the defendant may still affect the incidence of costs by payment into court: see RSC Ord 22; CCR Ord 11; RSC Ord 62 r 9(b); CCR Ord 38 r 1(2), (3); and CIVIL PROCEDURE.

4 *Briggs v Calverly* (1800) 8 Term Rep 629 (tender valid although made after solicitor had been instructed by creditor but before proceedings); *Moffat v Parsons* (1814) 5 Taunt 307 (valid tender made after creditors had instructed solicitor to act).

5 But the improper tender may amount to a repudiation of the contract: see para 997 et seq post.

6 See para 974 note 14 ante.

7 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, HL (payment order issued by charterer's bank to owner's bank in accordance with a special scheme operated by London banks).

8 Distinguish a demand bill, where a valid tender can be made at any time before action: *Norton v Ellam* (1837) 2 M & W 461 at 463.

9 *Hume v Peploe* (1807) 8 East 168; *Poole v Tumbridge* (1837) 2 M & W 223; *Dobie v Larkan* (1855) 10 Exch 776.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/D. TENDER/977. Tender must be unconditional.

### **977. Tender must be unconditional.**

A tender must be unconditional; that is, it must not be made upon any condition to which the creditor has a right to object<sup>1</sup>. It is bad if it is made on such terms that by taking the money the creditor would afterwards be precluded from claiming that a larger amount was due as, for instance, if the debtor requires as a condition of payment a receipt in full discharge<sup>2</sup>, or a receipt expressed to be for rent due to a particular day<sup>3</sup>. However, a tender is not invalidated by the fact that it is made 'under protest', or is accompanied by a statement that the amount is all that the debtor considers due, provided that the creditor is not required to make any admission as a condition of his receiving the money<sup>4</sup>. A tender is not invalid merely because the debtor asks for a receipt, if he does not make it a condition of payment<sup>5</sup>. Even if he makes it a condition, the creditor will be precluded from taking the objection if he refuses to accept the money on some other ground<sup>6</sup>.

Whether a tender accompanied by any such statements as those mentioned above is conditional or unconditional is a question of fact in each particular case<sup>7</sup>. However, a tender is not conditional just because the creditor disputes the amount due and refuses to accept the amount tendered<sup>8</sup>.

1 *Bevans v Rees* (1839) 5 M & W 306 at 309; *Re Steam Stoker Co* (1875) LR 19 Eq 416.

2 *Glasscott v Day* (1803) 5 Esp 48 (demand for receipt in full); *Evans v Judkins* (1815) 4 Camp 156 (offer to pay a sum to be accepted as the whole balance due); *Laing v Meader* (1824) 1 C & P 257 (demand for stamped receipt); *Cheminant v Thornton* (1825) 2 C & P 50 (offer 'in full of demand'); *Strong v Harvey* (1825) 3 Bing 304; *Peacock v Dickerson* (1825) 2 C & P 51n (offer coupled with statement that no more is owing); *Mitchell v King* (1833) 6 C & P 237 (offer 'as a settlement'); *Gordon v Cox* (1835) 7 C & P 172 (offer if creditor would take it 'in full of the bill'); *Hough v May* (1836) 4 Ad & El 954 (cheque sent indorsed 'balance account'); *Sutton v Hawkins* (1838) 8 C & P 259 (sum offered as 'all that is due'); *Field v Newport, Abergavenny and Hereford Rly Co* (1858) 3 H & N 409; *Foord v Noll* (1842) 2 Dowl NS 617; *Bowen v Owen* (1847) 11 QB 130 (demand for receipt in full discharge). For the effect of a receipt 'in full discharge' where a lesser sum is accepted for a greater see *D and C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; and para 1043 et seq post.

3 *Marquis of Hastings v Thorley* (1838) 8 C & P 573 (sum tendered as being 'in payment of half year's rent due'); *Finch v Miller* (1848) 5 CB 428 (offer of rent, with demand for a receipt to a particular day).

4 *Robinson v Ferreday* (1839) 8 C & P 752; *Manning v Lunn* (1845) 2 Car & Kir 13; *Scott v Uxbridge and Rickmansworth Rly Co* (1866) LR 1 CP 596; *Bowen v Owen* (1847) 11 QB 130; *Henwood v Oliver* (1841) 1 QB 409; *Sweny v Smith* (1869) LR 7 Eq 324; *Jones v Bridgman* (1878) 39 LT 500; *Greenwood v Sutcliffe* [1892] 1 Ch 1, CA. A tender of a mortgage debt conditionally upon the mortgagee then and there granting a previously approved reconveyance is a good legal tender to stop interest running: *Graham v Seal* (1918) 88 LJ Ch 31, CA.

5 *Jones v Arthur* (1840) 8 Dowl 442; cf the cases cited in note 2 supra. As to proof of payment of a cheque see para 947 note 1 ante.

6 *Cole v Blake* (1793) Peake 238; *Jones v Arthur* (1840) 8 Dowl 442; *Richardson v Jackson* (1841) 8 M & W 298.

7 *Marsden v Goode* (1845) 2 Car & Kir 133; *Eckstein v Reynolds* (1837) 7 Ad & El 80.

8 *Robinson v Ferreday* (1839) 8 C & P 752; *Henwood v Oliver* (1841) 1 QB 409; *Bowen v Owen* (1847) 11 QB 130.

### **UPDATE**

**961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(2) DISCHARGE BY PERFORMANCE OF THE CONTRACT/(ii) Non-performance as a Bar to Enforcement of Contract/D. TENDER/978. Tender by or to an agent.

### **978. Tender by or to an agent.**

A tender need not be made to the creditor personally; it may be made to any person authorised or held out as being authorised by him to receive payment on his behalf<sup>1</sup>. A person authorised to accept a tender has no implied authority to accept a cheque in payment, unless it can be shown that it is usual in the ordinary course of the particular business to take payment by cheque<sup>2</sup>. In the case of a debt owing to two or more persons jointly a tender made to one of the joint creditors on behalf of all operates as a tender to them all<sup>3</sup>.

A tender may be made by an agent if he has been authorised by the debtor to make it, or if his act has been subsequently ratified by the debtor<sup>4</sup>.

1 *Goodland v Blewith* (1808) 1 Camp 477; *Moffat v Parsons* (1814) 5 Taunt 307; *Crozer v Pilling* (1825) 4 B & C 26; *Kirton v Braithwaite* (1836) 1 M & W 310; *Watson v Hetherington* (1843) 1 Car & Kir 36; *Loddiges v Lister* (1860) 1 LT 548; *Finch v Boning* (1879) 4 CPD 143. A bailiff authorised to distrain for rent has implied authority to receive a tender of rent and expenses (*Hatch v Hale* (1850) 15 QB 10), but not a man who is merely left in possession by the bailiff (*Boulton (Bolton) v Reynolds* (1859) 29 LJB 11); and see *Bocking Garage v Mazurk* [1954] CLY 14, CA.

2 *Blumberg v Life Interests and Reversionary Securities Corp* [1897] 1 Ch 171; affd on facts [1898] 1 Ch 27, CA. See also para 944 ante.

3 *Douglas v Patrick* (1790) 3 Term Rep 683. As to payment of joint debts see para 1086 post.

4 *Read v Goldring* (1813) 2 M & S 86 (tender by agent of the whole sum although only authorised to tender part held to be a valid tender); *Harding v Davies* (1825) 2 C & P 77; *Farquharson v Pearl Assurance Co Ltd* [1937] 3 All ER 124 (valid tender of premium by mortgagee of insurance policy). As to the authority of an agent and the ratification of acts done by an agent without authority see AGENCY vol 1 (2008) PARAS 29 et seq, 57 et seq. Cf para 973 note 5 ante.

## **UPDATE**

### **961-978 Non-performance as a Bar to Enforcement of Contract**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(3) DISCHARGE BY STIPULATED EVENT/(i) Effluxion of Time/979. Contracts indefinite as to time.

### (3) DISCHARGE BY STIPULATED EVENT

#### (i) Effluxion of Time

##### 979. Contracts indefinite as to time.

It was formerly held that every contract not expressly limited as to duration was prima facie permanent and irrevocable, and placed upon the party asserting that the contract was not perpetual the burden of showing either some expression in the contract itself, or something in the nature of the contract, from which it could reasonably be implied that the contract was subject to determination<sup>1</sup>. Instances of contracts which on this approach were from their nature considered as being intended to be determinable by way of exception to this rule were contracts involving trust and confidence, delegation of authority, personal relations between the parties, and the necessity for mutual satisfaction with their conduct<sup>2</sup>, such as contracts of partnership<sup>3</sup>, contracts of agency<sup>4</sup> and contracts of service<sup>5</sup>.

Nowadays, there is probably no presumption of permanence of duration in any type of contract<sup>6</sup>. The fact that the character of legal perpetuity attaches to the legal personality of the contracting parties is not a sufficient reason for regarding the contract as permanent<sup>7</sup>. The question whether the contract is determinable depends upon the proper construction of the contract in every case; certainly this is so with regard to commercial or mercantile contracts<sup>8</sup>.

It will not be possible to imply a term as to, or to construe the contract as providing for, termination upon reasonable notice if this would conflict with an express term of the contract<sup>9</sup>.

<sup>1</sup> *Llanelly Rly and Dock Co v London and North Western Rly Co* (1873) 8 Ch App 942 at 949, 950 per James LJ (on appeal (1875) LR 7 HL 550 at 567 per Lord Selborne) (agreement between railway companies for running powers); *Crediton Gas Co v Crediton UDC* [1928] Ch 447, CA (where the agreement was in fact held to be revocable).

<sup>2</sup> Another instance of a contract which because of the nature of the relationship has been held to be determinable upon notice is an agreement, unlimited as to time, to pay a yearly sum by quarterly instalments to a doctor for the care and maintenance of a mentally afflicted person: *Hamilton v Bryant* (1914) 30 TLR 408; and in *Re Lindrea, Lindrea v Fletcher* (1913) 109 LT 623 it was held that an agreement, indefinite as to time, by a parent to give on the marriage of his daughter a specified sum annually is an agreement which, from its nature, is regarded as not being intended to be one for payment of such annual sum beyond the joint lives of the promisor and the promisee.

<sup>3</sup> See the Partnership Act 1890 ss 26, 32; and PARTNERSHIP.

<sup>4</sup> *JH Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894, [1966] 1 WLR 1582 (indefinite retainer between solicitor and client held revocable at any time; and see AGENCY vol 1 (2008) PARA 177 et seq). See also *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556, [1955] 2 All ER 722 ('agency' licence to manufacture, sell etc plaintiffs' products in America; a commercial relationship as well as one of confidence and trust and determinable on reasonable notice). See further AGENCY vol 1 (2008) PARA 170 et seq.

<sup>5</sup> There was formerly a presumption that a hiring indefinite in duration was to be on a yearly basis, but this no longer applies: *Richardson v Koefod* [1969] 3 All ER 1264, [1969] 1 WLR 1812, CA; see further EMPLOYMENT.

<sup>6</sup> *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 3 All ER 769 at 774-776, [1978] 1 WLR 1387 at 1395-1397, CA, per Lord Denning MR.

<sup>7</sup> *Crediton Gas Co v Crediton UDC* [1928] Ch 174 at 178 per Russell J; affd [1928] Ch 447, CA.



8 *Crediton Gas Co v Crediton UDC*[1928] Ch 447, CA; *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd*[1948] AC 173, [1947] 2 All ER 331, HL (contractual licence: see further para 981 post); *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd*[1955] 2 QB 556, [1955] 2 All ER 722 (see note 4 supra); *Re Spenborough UDC's Agreement, Spenborough Corp v Cooke, Sons & Co Ltd*[1968] Ch 139, [1967] 1 All ER 959; *Beverley Corp v Richard Hodgson & Sons Ltd* (1972) 225 Estates Gazette 799 (agreements regulating discharge of effluent into public sewer).

Where a water company agreed by deed to supply a hospital with water on specified terms 'at all times hereafter', it was held that the parties must have intended that, more than 70 years later, the agreement was, as a matter of construction terminable on reasonable notice: *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*[1978] 3 All ER 769, [1978] 1 WLR 1387, CA (rejecting the view that the case could be decided on either of the following bases: (1) frustration on just and equitable grounds (see para 898 ante); or (2) an implied term (see note 9 infra).

9 In *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd*[1957] 3 All ER 158, [1957] 1 WLR 1012, it was held that an agreement between two companies that neither would employ persons who had been employees of the other during the previous five years could be terminated by one year's notice. On appeal, however, the view was expressed (the agreement in fact being held void as being in restraint of trade) that any term which might be implied as to termination might be inconsistent with the express terms of the contract: [1959] Ch 108 at 117, [1958] 2 All ER 65 at 68, CA. See also *Birkenhead School Ltd v Birkenhead County Borough* [1973] CLY 979, (1973) Times, 16 March (continuing contract for which notice of determination should be of reasonable length); *Kirklees Metropolitan Borough Council v Yorkshire Woollen District Transport Co* (1978) 77 LGR 448 (99 year contract with local authority; latter subsequently lost statutory power to control such matters although contract not frustrated).

See also paras 783, 787 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(3) DISCHARGE BY STIPULATED EVENT/(i) Effluxion of Time/980. Contracts for fixed term.

### 980. Contracts for fixed term.

Where the parties to a contract stipulate that the contract is to continue for a definite period, the contract cannot be terminated before the expiration of that period<sup>1</sup>, unless the parties are empowered so to do by the terms of the contract<sup>2</sup>, or agree to abandon it<sup>3</sup>. If the duration of a contract for a fixed term is conditional on the approval of one of the parties, the contract can only be terminated within that period provided the disapproval of the party was genuine and not capricious<sup>4</sup>.

Where a contract provides that it is to continue for a fixed term and thereafter until determined by notice, the contract cannot be terminated before the specified period expires; but it is a matter of construction of the words used in the contract whether the contract is one that can be terminated at the end of the period by a notice given during that period, or whether it is one which can only be determined after the expiry of the definite term by notice given after the end of the term<sup>5</sup>.

1 *Ogdens Ltd v Nelson* [1905] AC 109, HL (promise by defendants to pay share of profits to dealer not excused by defendants' going into liquidation). See also the cases cited in para 786 notes 4-7 ante.

2 *Nelson v James Nelson & Sons Ltd* [1914] 2 KB 770, CA; *Diggle v Ogston Motor Co* (1915) 84 LJKB 2165; and see AGENCY vol 1 (2008) PARA 170 et seq; EMPLOYMENT.

3 See para 1014 et seq post.

4 *Diggle v Ogston Motor Co* (1915) 84 LJKB 2165. As to conditions that work is to be done to the satisfaction of one of the parties to the contract see para 964 ante.

5 *William Jacks & Co v Palmer's Shipbuilding and Iron Co* (1928) 98 LJKB 366, CA. See also *Brown v Symons* (1860) 8 CBNS 208 (contract for 12 months certain to 'continue from time to time until three months' notice in writing given by either party to determine same'; contract could be terminated at the end of the 12 months by three months' previous notice); *Langton v Carleton* (1873) LR 9 Exch 57 (contract 'for 12 months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice'; contract could be terminated at the end of the 12 months without any notice, the provision as to notice only applying if the contract was extended after the 12 months); *Re An Indenture, Marshall & Sons Ltd v Brinsmead & Sons Ltd* (1912) 106 LT 460 (contract for a fixed term to 'continue thereafter subject to determination by 12 months' previous notice by either side'; no notice could be given until after the fixed term had expired); *Costigan v Gray Bovier Engines Ltd* (1925) 41 TLR 372, CA (contract to 'continue for 12 months and thereafter until determined by three months' notice given by either party at any time to the other'; although the contract could not be terminated before the expiration of the 12 months, it could be determined at the end of, or at any time after, that term by notice given either during or after the period of 12 months); *William Jacks & Co v Palmer's Shipbuilding and Iron Co* supra (contract to 'hold good for 12 months with six months' notice thereafter on either side to terminate'; no notice could be given until after the 12 months had expired); *Morris Oddy & Co Ltd v Hayles* (1971) 219 Estates Gazette 831. As to terms of employment see EMPLOYMENT vol 39 (2009) PARA 88 et seq.

## UPDATE

### 980 Contracts for fixed term

NOTES--A stipulation that a contract ceases to be enforceable after a certain period precludes both an action for performance and an action for damages founded upon that contract: *Smith v Lindsay & Kirk* (2000) Times, 16 March.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(3) DISCHARGE BY STIPULATED EVENT/(i) Effluxion of Time/981. Contractual licences.

### 981. Contractual licences.

A contractual licence is a licence supported by consideration but not coupled with a grant<sup>1</sup>. At common law, such a licence might be effectively revoked at any time, whether or not it contained provisions regarding its duration and the licensee's only remedy was an action for damages<sup>2</sup>. However, equitable principles now prevail, and if on its proper construction<sup>3</sup> the licence is irrevocable or revocable only after a certain time, revocation will as a rule<sup>4</sup> be restrained by the grant of an injunction<sup>5</sup>; and the licensee may be able to obtain specific performance of the contractual licence to enter the premises<sup>6</sup>. Where the remedy of injunction cannot be applied because the licensee has already been ejected, it seems that the court will determine the parties' rights on the basis of what they would have been if there had been an opportunity to apply for an injunction<sup>7</sup>.

If a licence is terminable, but no period of duration is fixed, it is a question of construction whether it is terminable summarily or upon reasonable notice<sup>8</sup>, though even where the licence is terminable summarily a reasonable period will be allowed for the licensee to remove himself and his effects<sup>9</sup>.

The above rules might be seen in terms of good faith dealings<sup>10</sup>.

1 For example, the licence conferred by purchase of a ticket for an entertainment (*Hurst v Picture Theatres Ltd* [1915] 1 KB 1, CA), or the licence to a contractor carrying out works on the land of another (*Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326). For further consideration of contractual licences see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 10.

A licence is coupled with a grant when the licensee has been granted a proprietary interest (such as the right to timber or game) in the land of another and the licence is given so that he may exploit that interest: see *Thomas v Sorrell* (1673) Vaugh 330; and EASEMENTS AND PROFITS A PRENDRE. Such a right may be registrable under the Land Charges Act 1972 s 18(2), Sch 5 (as amended): see LAND CHARGES.

2 *Wood v Leadbitter* (1845) 13 M & W 838; *Thompson v Park* [1944] KB 408, [1944] 2 All ER 477, CA. The principle at law is that the licensor has power to remove the licensee, but no right to do so, and the remedy in damages is inadequate for it seems that a licensee who is forcibly ejected may not recover for an assault (*Wood v Leadbitter* supra); but see *Butler v Manchester, Sheffield & Lincolnshire Rly Co* (1888) 21 QBD 207, CA (passenger lost ticket and refused to pay further fare as required by conditions; recovered damages for assault in being forcibly ejected from carriage).

3 See *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL.

4 The decision in *Thompson v Park* [1944] KB 408, [1944] 2 All ER 477, CA (but see note 6 infra) may be supported on the ground that, if a person forcibly and riotously breaks into a building in the occupation of another, the court will grant to that other an interlocutory injunction expelling the entrant even though he has acted under a disputed claim to a subsisting licence, and also on the ground that the alleged licence was a licence to share occupation: *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 250, [1970] 3 All ER 326 at 339 obiter per Megarry J.

5 *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL, where, on the facts, it was held that the licence was revocable; but in the Court of Appeal a different construction had been put on the agreement and an injunction granted: (1946) 115 LJ Ch 297, CA. See also *Ivory v Palmer* (1975) 119 Sol Jo 405, CA. As to injunctions see generally CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

6 *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA; not following *Thompson v Park* [1944] KB 408, [1944] 2 All ER 477, CA (see note 4 supra).

7 *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173 at 191, [1947] 2 All ER 331 at 336-337, HL, obiter per Viscount Simon; see also that case in the Court of Appeal (1946) 115 LJ Ch 297 at 302-303 per Lord Greene MR. It is probably only upon this basis, and not upon the basis that there was a grant, that the decision in *Hurst v Picture Theatres Ltd* [1915] 1 KB 1, CA, can be supported. For a contrary view, denying the applicability of the remedy of injunction to contracts such as that in *Hurst v Picture Theatres Ltd* supra see *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, Aust HC.

8 *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL (licence of theatre held terminable on reasonable notice); *Minister of Health v Bellotti* [1944] KB 298, [1944] 1 All ER 238, CA (licence to occupy rooms held terminable on reasonable notice); *Dorling v Honnor Marine Ltd* [1964] Ch 560, [1963] 2 All ER 495 (licence to build boats terminable only on reasonable notice); *Australian Blue Metal Ltd v Hughes* [1963] AC 74, [1962] 3 All ER 335, PC (mining licence held terminable without notice).

9 *Australian Blue Metal Ltd v Hughes* [1963] AC 74, [1962] 3 All ER 335, PC (period of grace to remove equipment); see also *White v Blackmore* [1972] 2 QB 651, [1972] 3 All ER 158, CA.

10 See para 613 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(3) DISCHARGE BY STIPULATED EVENT/(ii) Contractual Provision for Termination/982. In general.

## (ii) Contractual Provision for Termination

### 982. In general.

It is not unusual for parties to a contract to stipulate expressly or impliedly that the contract shall be determinable in certain circumstances, such as notice at the option of either party<sup>1</sup>, or non-performance or breach of a term of the contract<sup>2</sup>, or on the happening of a particular event<sup>3</sup>.

In principle, the common law is normally willing to give effect to such clauses, however unreasonable their enforcement<sup>4</sup>, subject to the burden of proof<sup>5</sup> and relief against penalties<sup>6</sup>. However, the effect of such clauses may be restricted or nullified by statute<sup>7</sup>, and in a standard form contract such a term would only have any effect if fair and reasonable<sup>8</sup>; and in a consumer supply contract such a term, if not individually negotiated, is not binding on the consumer<sup>9</sup>.

The issue might be seen in terms of good faith dealings<sup>10</sup>.

1 See para 983 post. For provisions as to cancellation in charterparties see *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos*[1971] 1 QB 164, [1970] 3 All ER 125, CA; and CARRIAGE AND CARRIERS. As to notice in contracts of employment see the Employment Rights Act 1996 ss 86, 210; and EMPLOYMENT vol 40 (2009) PARA 690 et seq. As to the dissolution of partnership on notice see the Partnership Act 1890 ss 26, 32; and PARTNERSHIP vol 79 (2008) PARA 174. As to notice of revocation of authority of an agent see AGENCY vol 1 (2008) PARA 181 et seq. As to notice to determine tenancies see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 213 et seq.

2 See para 991 post. Eg the cancellation clause in charterparties for failure to deliver the ship: *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos*[1971] 1 QB 164, [1970] 1 All ER 673; revsd on other grounds on appeal [1970] 1 QB 184, [1970] 3 All ER 125, CA; and see further CARRIAGE AND CARRIERS. Contracts for the sale of land commonly give the vendor the right to rescind the sale, if the purchaser insists on any objection or requisition which the vendor is unwilling or unable to remove or comply with (*Merrett v Schuster*[1920] 2 Ch 240; *Re Des Reaux and Setchfield's Contract*[1926] Ch 178), or if the purchaser does not pay on the appointed day (*Roberts v Wyatt* (1810) 2 Taunt 268), and may empower the purchaser to rescind the contract, if the vendor does not make a good title (*Roberts v Wyatt* supra; and see SALE OF LAND); contracts for the sale of a specific chattel may contain a stipulation for the return of the chattel on breach of a condition (*Street v Blay* (1831) 2 B & Ad 456; *Couston v Chapman*(1872) LR 2 Sc & Div 250, HL); and leases usually contain a forfeiture clause giving a right of re-entry by the lessor on non-payment of rent, or non-performance or non-observance by the lessee of the covenants of the lease (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 603); *Harrods Ltd v Schwartz-Sackin & Co Ltd* [1991] FSR 209, CA (termination of franchise); *Glolite Ltd v Jasper Conran Ltd*(1998) Times, 28 January (termination allowed for 'any material or irremediable breach'). As to determination for breach of a building contract see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 115 et seq.

3 *Re Lindrea, Lindrea v Fletcher* (1913) 109 LT 623; *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France*[1919] AC 1 at 9, HL. Charterparties, for example, often stipulate that the charterparty shall be cancelled if the ship is commandeered (*Capel v Soulid*[1916] 2 KB 365, CA), or in the event of war, blockade, or prohibition of export preventing loading (*Adamson v Newcastle Steamship Freight Insurance Association*(1879) 4 QBD 462), or accident to, or detention of, the ship (*Braemount Steamship Co Ltd v Andrew Weir & Co* (1910) 102 LT 73). 'War' in a commercial document has its ordinary meaning and not the technical one based on international law: *Kawasaki Kisen Kaisha Ltd v Mitsui Bussan Kaisha Ltd* (No 2) [1939] 2 KB 544, [1939] 1 All ER 819, CA; and see further CARRIAGE AND CARRIERS. Leases usually contain a forfeiture clause giving a right of re-entry by the lessor on the bankruptcy of the lessee or on the levy of execution on his goods: see *Smith v Gronow*[1891] 2 QB 394; and *Smart Bros Ltd v Holt*[1929] 2 KB 303 (hire-purchase agreement). Building contracts generally empower the employer to cancel the contract in the event of the builder becoming bankrupt or insolvent although such a stipulation is generally void as against a trustee in bankruptcy or a liquidator see generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 124.

4 *Financings Ltd v Baldock*[1963] 2 QB 104 at 115, [1963] 1 All ER 443 at 448, CA; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA, The Mihaios Xilas*[1979] 2 All ER 1044, [1979] 1 WLR 1018, HL.

5 The burden is on the party seeking to terminate the contract to prove the existence of the facts justifying termination: *PJ Van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep 240 (force majeure clause); and see para 906 ante.

6 See para 985 post.

7 See eg the Law of Property Act 1925 s 146 (as amended) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 619); and the Consumer Credit Act 1974 ss 76, 86, 87, 98 (see CONSUMER CREDIT vol 9(1) (Reissue) paras 234, 249, 262-263).

8 See the Unfair Contract Terms Act 1977 s 3(2)(b)(ii); and para 819 et seq ante.

9 It may be an 'unfair term' within the Unfair Terms in Consumer Contract Regulations 1994, SI 1994/3159, being a 'grey term' within reg 4(4), Sch 3 paras (c), (f), (g): see para 794 ante.

10 See para 613 ante.

## UPDATE

### 982-983 In general ... Termination by notice

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### 982 In general

NOTE 2--See *Rice (t/a Garden Guardian) v Great Yarmouth BC*(2000) Times, 26 July, CA (maintenance contract not determinable notwithstanding cumulative effect of minor contractual breaches).

NOTE 3--See *Bland v Sparkes*(1999) Times, 17 December, CA (contract determinable in the event of particular conduct by one of the parties was determinable even though such conduct took place before contract was made).

NOTE 9--SI 1994/3159 reg 4(4), Sch 3 para 1(c),(f),(g) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 para 1(c), (f), (g).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(3) DISCHARGE BY STIPULATED EVENT/(ii) Contractual Provision for Termination/983. Termination by notice.

### 983. Termination by notice.

At common law<sup>1</sup>, if a contract contains an express<sup>2</sup> or implied<sup>3</sup> provision that one of the parties to it may determine the contract by notice<sup>4</sup>, notice must be given<sup>5</sup> in accordance with the terms of the contract<sup>6</sup>; but the right to notice may be waived<sup>7</sup>, as may the right to terminate for breach<sup>8</sup>.

Where it is stipulated that the notice shall be one of a specified length of time, a valid notice is given if the date given in the notice is a fixed and determinable date not less distant than the specified length of time<sup>9</sup>. If the right to determine a contract by notice depends upon the performance of a condition precedent<sup>10</sup>, prima facie<sup>11</sup>, it is essential for the party seeking to exercise his right of determining the contract first to show that the condition has been fulfilled<sup>12</sup> or waived<sup>13</sup>.

Notice of termination validly given cannot thereafter be withdrawn without agreement<sup>14</sup>.

1 As to the position where the agreement is regulated under the Consumer Credit Act 1974 and the creditor may be required to give seven days' notice before acting on certain provisions of the agreement see ss 76, 87, 98; and CONSUMER CREDIT vol 9(1) (Reissue) paras 234, 262-263.

2 See paras 980, 982 ante.

3 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, HL. However, there is no implied provision that an unlawful repudiation amounts to lawful determination upon reasonable notice: *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA.

4 In the event that a contract providing for termination by notice is unenforceable, it is not possible, in the event that services are rendered under the contract, to imply a term as to reasonable notice; to do so would be to imply a fresh contract from acts done in pursuance of an unenforceable express contract while that express contract was still in existence: *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551, [1950] 2 All ER 1099, CA; and see further para 618 ante.

5 It is a question of construction whether the notice takes effect on dispatch or receipt: *Scarf v Jardine* (1882) 7 App Cas 345 at 348, HL; *Re London and Northern Bank, ex p Jones* [1900] 1 Ch 220; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL.

6 *Legg d Scot v Benion* (1738) Willes 43; *Re Viola's Indenture of Lease, Humphrey v Stenbury* [1909] 1 Ch 244; *William Jacks & Co v Palmer's Shipbuilding and Iron Co* (1928) 98 LJB 366, CA; *Re Berker Sportcraft Ltd's Agreements, Hartnell v Berker Sportcraft Ltd* (1947) 177 LT 420; *Reliance Car Facilities Ltd v Roding Motors* [1952] 2 QB 844, [1952] 1 All ER 1355, CA. As to the time within which notice must be given in the case of contracts for a fixed term and to continue thereafter until determined by notice see *William Jacks & Co v Palmer's Shipbuilding and Iron Co* supra; and the other cases in para 980 note 5 ante.

7 *Friary Holroyd and Healey's Breweries Ltd v Singleton* [1899] 2 Ch 261, CA; and see *Laycock v Bulmer* (1844) 13 LJ Ex 156; *Macnaghten v Paterson* [1907] AC 483, PC.

8 *Keith, Prowse & Co v National Telephone Co* [1894] 2 Ch 147; *Reynolds v General & Finance Facilities* (1963) 107 Sol Jo 889, CA. As to the rights of the innocent party see para 1002 post.

No such waiver was found in the following cases: *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, HL; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA, The Mihaios Xilas* [1979] 2 All ER 1044, [1979] 1 WLR 1018, HL.

9 *H Boot & Sons (London) Ltd v Uttoxeter UDC* (1924) 88 JP 118, CA. As to the application of this principle to the determination of contracts of tenancy see LANDLORD AND TENANT.



10 See para 962 ante. As to the performance of conditions precedent see paras 966-970 ante.

11 However, the contract may evince an intention that the precedent requirement is not a condition: *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL ('without delay' was only intended to be an intermediate term). As to innominate terms see para 995 post.

12 *Simons v Associated Furnishers Ltd* [1931] 1 Ch 379 (where a lease contained a clause, giving the tenant power to determine the lease by notice provided he should up to the time of determination perform and observe the covenants and conditions of the lease, and it was held that the clause was complied with if at the end of the term there should not exist any cause of action in respect of performance of covenants, and, therefore, that a notice to determine the lease was not invalidated by the fact that when the notice was given there were unremedied breaches of contract, so long as such breaches were remedied before the expiration of the notice). See further LANDLORD AND TENANT. See also *Afovos Shipping Co SA v Pagnan, The Afovos* [1983] 1 All ER 449, sub nom *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan (t/a R Pagnan & filli)* [1983] 1 WLR 195, HL; *Tradax Export SA v Dorada Cia Naviera SA, The Lutetian* [1982] 2 Lloyd's Rep 140; *Telfair Shipping Corp v Athos Shipping Co SA, The Athos* [1983] 1 Lloyd's Rep 127, CA. As to waiver see para 1025 et seq post.

13 Defects in the notice may be waived: *Alfred C Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep 118, CA; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL; *Bremer Handelsgesellschaft mbH v C Mackprang* [1979] 1 Lloyd's Rep 221, CA; *Bunge GmbH v Alfred C Toepfer* [1979] 1 Lloyd's Rep 554, CA.

14 *Riordan v War Office* [1959] 3 All ER 552, [1959] 1 WLR 1046 (affd [1960] 3 All ER 774n, [1961] 1 WLR 210, CA); *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 235, [1971] 1 WLR 361 at 382, CA, per Buckley LJ; *Harris and Russell Ltd v Slingsby* [1973] 3 All ER 31, NIRC.

## UPDATE

### 982-983 In general ... Termination by notice

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### 983 Termination by notice

NOTE 12--Mere reference to source of information within which diligent enquirer might find relevant information does not satisfy requirements of clause provided for fair disclosure: *Curtis v Lockheed Martin UK Holdings Ltd* [2008] EWHC 2691 (Comm), [2008] All ER (D) 306 (Nov).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(3) DISCHARGE BY STIPULATED EVENT/(ii) Contractual Provision for Termination/984. Termination on happening of event within control of party.

#### **984. Termination on happening of event within control of party.**

Where it is stipulated in a contract that it shall be determined or shall be 'void'<sup>1</sup> on the happening of a certain event, prima facie the contract will then fail<sup>2</sup>. However, if the stipulation is that this shall come about on the happening of an event which one or either of the parties can by his own act or omission cause to occur, then the party who by his own wrongful act or omission brings about the event can neither insist upon the stipulation himself nor compel the other party to insist upon it. Thus a contract, the duration of which is conditional on the approval of one of the parties, cannot be terminated by a disapproval that is capricious and not genuine<sup>3</sup>. Under a condition in a contract for the sale of land that, if the purchaser insists on any stipulation or requisition which the vendor is unwilling or unable to remove or comply with, the vendor may rescind the contract, the vendor must not act arbitrarily or unreasonably<sup>4</sup>. Similarly, a lessee cannot avail himself of his own act to vacate his lease<sup>5</sup>; nor can a landlord, who has agreed that his tenant's possession of a house shall continue until he comes under an obligation to demolish the house, entitle himself to recover possession by voluntarily putting himself under that obligation<sup>6</sup>. This is an application of the rule that a party may never take advantage of his own wrong, which is a general principle of construction<sup>7</sup> and can therefore be overridden by express terms<sup>8</sup>. The same principle applies where there is a condition precedent to the contract coming into effect<sup>9</sup>. However, the effect of such clauses may be restricted or nullified by statute<sup>10</sup>.

1 It has been said that where an event, which under the contract renders the contract 'void', may occur naturally or by the act of a party, 'void' will be read as 'voidable' however the event occurs: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 442, Aust HC. See also *Beitel v Sorokin and Monaghan* [1973] 5 WWR 639, 38 DLR (3d) 455, Alta App Div (defendant granted an option to purchase shares in an agreement which provided that if he defaulted on instalments he should forfeit all rights to the shares and that the agreement arising out of the option should become null and void; the defendant exercised the option but subsequently defaulted on the instalments; the plaintiff brought an action for payment of the balance of the purchase price but the defendant asserted the agreement had become null and void and that he was not obliged to make further payment; it was held that the defendant could not take advantage of his own default and that the forfeiture clause was merely voidable at the option of the plaintiff).

2 *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1, HL. See also paras 891, 906 ante.

3 See paras 963-964 ante.

4 See the cases cited in para 982 note 2 ante; and generally SALE OF LAND.

5 *Reid v Parsons* (1817) 2 Chit 247, sub nom *Rede v Farr* 6 M & S 121.

6 *Marco v Valente* (1953) 162 Estates Gazette 117; see further LANDLORD AND TENANT.

7 *Alghussein Establishment v Eton College* [1991] 1 All ER 267, [1988] 1 WLR 587, HL.

8 *Micklefield v SAC Technology Ltd* [1991] 1 All ER 275, [1990] 1 WLR 1002. This could be seen in terms of good faith dealings: see para 613 ante.

9 *Scott v Rania* [1966] NZLR 527 at 534, NZ CA, obiter per McCarthy J. See also para 969 ante (party preventing fulfilment of condition precedent to his own obligation to perform). As to conditions precedent see para 962 et seq ante.

10 See para 982 ante.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(3) DISCHARGE BY STIPULATED EVENT/(ii) Contractual Provision for Termination/985. Return of payments: relief against penalty.

### **985. Return of payments: relief against penalty.**

A clause in a contract to the effect that if one of the parties makes default the other shall be at liberty to cancel the contract and to retain any payments made under or on account of the contract<sup>1</sup>, whilst not a penalty at common law<sup>2</sup>, may amount to a stipulation similar to a penalty<sup>3</sup> against which equity may give relief by allowing the party in default to recover such part of those payments as it would be unconscionable to allow the other party to retain<sup>4</sup>. This equitable jurisdiction could be seen in terms of good faith dealings<sup>5</sup>.

1 As to deposits and part payments and recovery thereof generally see *RESTITUTION* vol 40(1) (2007 Reissue) paras 94 et seq, 108-110.

2 For relief against penalties in general see *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL; *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL; *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA; and *DAMAGES*. As to a case where the normal rules against penalties were inapplicable see *Golden Bay Realty Property Ltd v Orchard Twelve Investments Property Ltd* [1991] 1 WLR 981, 135 Sol Jo 92, PC.

3 The common law rule against penalties is not, strictly speaking, applicable, though equity may give relief where the provision is of a penal nature: see *Stockloser v Johnson* [1954] 1 QB 476, [1954] 1 All ER 630, CA; *Pye v British Automobile Commercial Syndicate Ltd* [1906] 1 KB 425.

4 *Stockloser v Johnson* [1954] 1 QB 476, [1954] 1 All ER 630, CA, per Somervell and Denning LJ; see also *Re Dagenham (Thames) Dock Co, ex p Hulse* (1873) 8 Ch App 1022; *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319, PC; *Steedman v Drinkle* [1916] 1 AC 275, PC. But see *Stockloser v Johnson* supra per Romer LJ; *Galbraith v Mitchenall Estates Ltd* [1965] 2 QB 473, [1964] 2 All ER 653; *Barton, Thompson & Co Ltd v Stapling Machines Co* [1966] Ch 499, [1966] 2 All ER 222; *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567, [1974] 1 WLR 816, CA; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 2 All ER 321, [1984] 1 WLR 776, HL; and see *DAMAGES*; *EQUITY*; *SALE OF LAND*; *SPECIFIC PERFORMANCE*.

5 See para 613 ante.

## **UPDATE**

### **985 Return of payments: relief against penalty**

NOTE 4--See also *Euro London Appointments Ltd v Claessens International Ltd* [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep 436.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/ (4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT/(i) Grounds for Rescission/986. Rescission in general.

## **(4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT**

### **(i) Grounds for Rescission**

#### **986. Rescission in general.**

Rescission is the name given to a process whereby an existing contract is brought to an end and the effects of its existence are cancelled or terminated. The terminology is somewhat imprecise because 'rescission' as commonly used has come to cover a number of different situations, some of which give rise to a right to treat the contract as discharged at common law and some of which lead only to the contract being set aside in equity<sup>1</sup>.

Where a contract is induced by innocent misrepresentation, a court of Chancery may allow the representee a prima facie<sup>2</sup> right to rescind it ab initio<sup>3</sup>; that is, the contract may be annulled in every respect so as to produce a state of affairs as though the contract had never been entered into<sup>4</sup>. Other cases where equity will rescind a contract ab initio include constructive fraud<sup>5</sup>, and mistake<sup>6</sup>.

Where a contract has been broken by one party<sup>7</sup>, the other may be entitled to a prima facie<sup>8</sup> right to rescind it de futuro<sup>9</sup>; that is, the latter may be entitled to treat the contract as discharged, in which case for most purposes it will terminate as from that moment<sup>10</sup>. This will be the case, for example, where there has been a breach of condition<sup>11</sup>, repudiation<sup>12</sup>, fraudulent misrepresentation<sup>13</sup>, or rescission by subsequent agreement<sup>14</sup>.

Though in some circumstances it is possible to bring an action for rescission<sup>15</sup>, rescission always involves an act of a party (or of both parties<sup>16</sup>) which, if rightly exercised, may be relied upon as a defence in any subsequent action<sup>17</sup>. The use of the same terminology for different situations should not, however, obscure the differences which exist between the varieties of rescission: it seems that where rescission is sought on equitable grounds<sup>18</sup> its effect is to restore the parties to the position before the contract was entered into<sup>19</sup>, whereas rescission at common law for breach<sup>20</sup> simply discharges the parties from further obligations to perform the contract<sup>21</sup>. Following rescission of a contract either ab initio or de futuro, it may be possible to recover money paid in restitution as on total failure of consideration<sup>22</sup>.

1 For yet another use of the expression 'rescission' see para 1014 note 5 post.

2 As to the bars to rescission whereby the representee might lose this prima facie right see note 19 infra.

3 See para 987 post. Rescission for innocent misrepresentation was possible at common law only if it led to a total failure of consideration (*Kennedy v Panama, New Zealand and Australian Royal Mail Co Ltd*(1867) LR 2 QB 580); but the wider rule of equity now prevails.

4 *Buckland v Farmer & Moody*[1978] 3 All ER 929 at 938, sub nom *Buckland v Farmer & Moody* [1978] 1 WLR 221 at 232, CA, per Buckley LJ.

5 Eg in the exercise of undue influence: see *Tate v Williamson*(1866) 2 Ch App 55; and see EQUITY; MISREPRESENTATION AND FRAUD.

6 See para 988 post.

7 See para 990 post.

8 For the situations where the prima facie right to rescind for breach is lost see paras 1010-1011 post.

9 See para 1002 post.

10 *Buckland v Farmer & Moody*[1978] 3 All ER 929 at 938, sub nom *Buckland v Farmar & Moody* [1979] 1 WLR 221 at 232, CA, per Buckley LJ; citing the following cases where 'rescind' was used in this sense: *Mussen v Van Diemen's Land Co*[1938] Ch 253 at 260, [1938] 1 All ER 210 at 215; *Hirji Mulji v Cheong Yue Steamship Co Ltd*[1926] AC 497 at 509-510, PC; *Heyman v Darwin Ltd*[1942] AC 356 at 361, [1942] 1 All ER 337 at 341, HL. See also *RV Ward Ltd v Bignal*[1967] 1 QB 534 at 538, [1967] 2 All ER 449 at 455, CA, per Diplock LJ. However, the contract is not terminated for all purposes: see paras 989, 1002 post

11 Thus a 'condition' is a term the breach of which gives the innocent party the right to rescind and sue for damages (see paras 993-994 post). However, the Sale of Goods Act 1979 s 11(3) defines a condition as a term 'the breach of which may give rise to a right to treat the contract as repudiated' (see para 993 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 63-64, 284). Similarly, 'repudiation' is sometimes used to describe rightful termination (ie rescission) as well as wrongful renunciation of the contract (as to which see para 997 et seq post).

12 See paras 997-1001 post.

13 See *Stevenson v Newnham* (1853) 13 CB 285, Ex Ch; and MISREPRESENTATION AND FRAUD.

14 See paras 1014-1018 post.

15 See eg *Solle v Butcher*[1950] 1 KB 671, [1949] 2 All ER 1107, CA.

16 As to rescission by agreement see para 1014 et seq post.

17 'The verdict [in an action subsequent to an act of rescission by a party] is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract': *Abram Steamship Co Ltd v Westville Shipping Co Ltd*[1923] AC 773 at 781, HL, per Lord Atkinson; cf *Solle v Butcher*[1950] 1 KB 671, [1949] 2 All ER 1107, CA (rescission granted upon terms).

18 See notes 4-6 supra.

19 It is generally a requirement of rescission on equitable grounds that restitutio in integrum be possible: see *Newbigging v Adam*(1886) 34 ChD 582 at 595, CA, per Bowen LJ. A party claiming rescission on equitable grounds may also find his claim barred by affirmation, lapse of time, or acquisition of rights by an innocent third party; see further MISREPRESENTATION AND FRAUD.

The above limitations also apply to a claim to rescind on the ground of fraudulent misrepresentation, notwithstanding that that remedy was recognised at common law as well as in equity.

20 See note 11 supra.

21 See the cases cited in note 10 supra. See also *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476, 477 (Aust HC) per Dixon J; *Osborne v Australian Mutual Growth Fund* [1972] 1 NSWLR 100. In particular, where there is rescission for breach of contract, the contract remains alive to the extent of allowing claims for damages in respect of breaches before discharge: *Hirji Mulji v Cheong Yue Steamship Co Ltd*[1926] AC 497 at 510, PC; and see further para 1002 post. Cf *Thorpe v Fasey*[1949] Ch 649, [1949] 2 All ER 393, which suggests that restitutio in integrum is an essential condition of discharge by breach; and see *Butler v Croft* (1973) 27 P & CR 1.

22 See para 992 post. As to restitution see RESTITUTION.

## UPDATE

### 986 Rescission in general

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/ (4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT/(i) Grounds for Rescission/987. Rescission for misrepresentation.

### **987. Rescission for misrepresentation.**

Where a person has entered into a contract as a result of a misrepresentation<sup>1</sup> made to him by another party to it he may, subject to certain limitations, rescind the contract<sup>2</sup>; and in addition, or as an alternative, he may have a claim for damages<sup>3</sup>. Another explanation of this jurisdiction may be that it stems from bad faith dealings<sup>4</sup>.

1 See para 767 ante. It does not matter that the misrepresentation was not the sole inducement to contract: see *Edgington v Fitzmaurice* (1885) 29 ChD 459, CA. As to misrepresentation see generally MISREPRESENTATION AND FRAUD.

2 See *Directors etc of Central Rly Co of Venezuela v Kisch* (1867) LR 2 HL 99 (fraud); *Cooper v Joel* (1859) 1 De GF & J 240, CA (innocent misrepresentation); *Mapes v Jones* (1974) 232 Estates Gazette 717 (also a repudiation: see para 999 post); the Misrepresentation Act 1967 s 1; and MISREPRESENTATION AND FRAUD.

3 See *ibid* s 2; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 834.

4 See para 613 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/ (4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT/(i) Grounds for Rescission/988. Rescission for mistake.

**988. Rescission for mistake.**

Even where a contract is not void for mistake<sup>1</sup>, in certain circumstances it may be rescinded on the ground of mistake<sup>2</sup>. These rules could be seen in terms of good faith dealings<sup>3</sup>.

1 See para 894 et seq ante; see further *Bell v Lever Bros Ltd* [1932] AC 161, HL; and MISTAKE vol 77 (2010) PARA 52.

2 See *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA; para 896 ante; and MISTAKE vol 77 (2010) PARA 52.

3 See para 613 ante.



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## **(ii) Rescission for Breach of Contract**

### **A. INTRODUCTION**

#### **989. General rule.**

Where one party (A) to a contract has committed a serious breach of contract by a defective performance<sup>1</sup> or by repudiating his obligations under the contract<sup>2</sup>, the innocent party (B) will have the right to rescind the contract *de futuro*<sup>3</sup>; that is, to treat himself as discharged from the obligation to tender further performance<sup>4</sup>, and to sue for damages for any loss he may have suffered as a result of the breach<sup>5</sup>. Such a breach by A does not usually itself automatically terminate the contract<sup>6</sup>. B has the right to elect to treat the contract as continuing or to terminate it by rescission<sup>7</sup>.

In a case where it is alleged that B has the right to rescind for breach, it must be determined (1) whether there has been a breach by A of a term of the contract or a mere misrepresentation<sup>8</sup>; (2) whether the breach is sufficiently serious to justify rescission *de futuro* of the contract by B<sup>9</sup>, as well as to a claim for damages<sup>10</sup>; and (3) whether B has instead elected to affirm the contract<sup>11</sup>.

Where a contract has been so rescinded *de futuro*, it has been said that all the primary obligations of the parties under the contract which have not yet been performed will terminate. This termination does not prejudice the right of the party so electing (B) to claim damages from the party in repudiatory breach (A) for any loss sustained in consequence of the non-performance by A of his primary obligations under the contract, future as well as past<sup>12</sup>. Nor does the termination deprive A of the right to claim, or to set off, damages for any past non-performance by B of B's own primary obligations, due to be performed before the contract was rescinded<sup>13</sup>.

A party may be entitled to a declaration that he is no longer bound by the contract<sup>14</sup>.

1 See paras 990-996 post.

2 See paras 997-1001 post.

3 As to rescission *de futuro* see para 986 ante.

4 As to performance of the contract see para 921 ante.

5 See para 1012 post.

6 Except in the case of frustrating breaches: see para 899 ante.

7 See paras 1002-1011 post.

8 For the distinction between terms and representations see para 768 ante. Rescission for innocent misrepresentation was not generally available at common law (see para 986 note 3 ante). As to rescission in equity for innocent misrepresentation see para 987 ante.

9 See paras 1002-1011 post.

10 Damages are available as a remedy for any breach: see para 1012 post.

11 See para 1010 post.

12 See para 1002 post.

13 *Berger & Co Inc v Gill & Duffus SA*[1984] AC 382 at 390, sub nom *Gill & Duffus SA v Berger & Co Inc*[1984] 1 All ER 438 at 442-443, HL, per Lord Diplock.

14 *Société Maritime et Commerciale v Venus Steam Shipping Co Ltd* (1904) 9 Com Cas 289. If, however, notwithstanding the breach, the innocent party (B) goes on performing his part of the contract he has affirmed the contract and the declaration will not be made: *Howard v Pickford Tool Co Ltd*[1951] 1 KB 417, CA. As to affirmation in general see paras 1010-1011 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/ (4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT/(ii) Rescission for Breach of Contract/B. DEFECTIVE PERFORMANCE/990. Defective performance in general.

## **B. DEFECTIVE PERFORMANCE**

### **990. Defective performance in general.**

In every case of breach of contract a question may arise as to whether the breach is of such a nature that the party not in default has the choice of treating the contract as discharged<sup>1</sup>. At common law, not every breach of contract has this effect<sup>2</sup>; but no single test has been devised for distinguishing breaches which do lead to a right to rescind from those which do not. All the following formulae continue to have some authority, though there is a considerable degree of overlap among them: (1) failure of condition precedent<sup>3</sup>; (2) failure of consideration<sup>4</sup>; (3) whether there is a breach of a condition or of a warranty<sup>5</sup>; (4) effect of the breach<sup>6</sup>; and (5) fundamental breach<sup>7</sup>. Repudiation of the contract is considered later<sup>8</sup>.

However, the common law provides only a prima facie rule. The parties may oust the common law by laying down in their contract an express regime applicable upon breach<sup>9</sup>. If they do so, the effect of any breach within those terms becomes a matter of construction<sup>10</sup>. However, clear words are needed to rebut the presumption that a contracting party does not intend to abandon the ordinary common law remedies<sup>11</sup> and, even where the parties do oust the common law, it is not necessarily displaced completely, but may only be ousted pro tanto<sup>12</sup>.

1 Such a breach does not usually of itself discharge the contract: see para 1002 et seq post.

2 See paras 921, 962 ante.

3 See para 991 post. As to conditions precedent see para 962 ante.

4 See para 992 post.

5 See paras 993-994 post.

6 See para 995 post.

7 See para 996 post.

8 See para 997 et seq post.

9 *Stocznia Gdanska SA v Latvian Shipping Co*[1998] 1 All ER 883, [1998] 1 WLR 575, HL (decision of the court expressed by Lord Goff of Chieveley at 895 and 587 to be consistent with the conclusion reached by the House of Lords in *Hyundai Heavy Industries Co Ltd v Papadopoulos*[1980] 2 All ER 29, [1980] 1 WLR 1129, HL). See also *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* [1998] 3 CL 118.

10 *Stocznia Gdanska SA v Latvian Shipping Co*[1998] 1 All ER 883 at 890, [1998] 1 WLR 575 at 582, HL, per Lord Goff of Chieveley; *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* [1998] 3 CL 118.

11 See para 772 et seq ante.

12 *Stocznia Gdanska SA v Latvian Shipping Co*[1998] 1 All ER 883, [1998] 1 WLR 575, HL, where a clause granting the unpaid seller a right of resale did not show an implied intention to forgo the common law right to instalments of the price payable before the contract was rescinded. These instalments were held to be recoverable as debts: see also para 942 note 16 ante.

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### **991. Failure of condition precedent.**

In considering whether there has been defective performance such that the innocent party may treat the contract as discharged<sup>1</sup>, it must be ascertained whether, on the proper construction of the contract<sup>2</sup>, the performance of the promise of one party is a condition precedent to the liability of the other to perform his part or is independent of it<sup>3</sup>; or whether a stipulation as to time is 'of the essence'<sup>4</sup>.

This test is not confined to cases of alleged discharge by breach, for the condition precedent may be such that its non-performance does not give rise to any liability in damages in the party who was to fulfil the condition<sup>5</sup>.

1 See generally para 990 ante.

2 See *Havelock v Geddes* (1809) 10 East 555 (charterparty; agreement to repair ship not condition precedent); *Davidson v Gwynne* (1810) 12 East 381 (stipulation to sail with first convoy not condition precedent); *Neale v Ratcliff* (1850) 15 QB 916 (agreement to keep in repair; condition precedent that premises first be put in repair by other party); *Graves v Legg* (1854) 9 Exch 709 (declaration of name of ship in which wool shipped a condition precedent to obligation to accept the wool); *Christie v Borelly* (1860) 7 CBNS 561 (payment of bill not condition precedent to liability on guarantee); *Seeger v Duthie* (1860) 8 CBNS 45 (charterparty; readiness of ship to sail not condition precedent); *Behn v Burness* (1863) 3 B & S 751, Ex Ch (statement in charterparty that ship 'now in port of A' a condition precedent); *Pust v Dowie* (1865) 5 B & S 33 (charterparty; ship to take not less than 1,000 tons); *Roberts v Brett* (1865) 11 HL Cas 337 (giving a bond for due performance held a condition precedent to right to sue for non-performance by other party); *Bettini v Gye* (1876) 1 QBD 183 (agreement to attend rehearsals for so many days before performance not condition precedent to contract to sing in opera); *Barnard v Faber* [1893] 1 QB 340, CA (condition precedent in fire insurance policy); *Reardon Smith Line Ltd v Hansen-Tansen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, HL (charterparty of yet to be built ship in a named Japanese yard; held: building the ship in another Japanese yard did not entitle the charterer to refuse delivery).

3 *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274, CA; see also the notes to *Pordage v Cole* (1669) 1 Wms Saund 319; and the notes to *Cutter v Powell* (1795) 6 Term Rep 320 in 2 S Edn 10; and see *Thomas v Cadwallader* (1744) Willes 496.

The criteria for determining whether promises are in this sense dependent or independent are considered in para 967 ante. See also *Pordage v Cole* supra; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 267.

4 See para 932 ante. For instance, in a contract to make stage payments as a shipbuilding contract proceeds, the shipbuilder is not entitled to a stage payment until the stage has been completed, but he may be entitled to damages in respect of that non-performance: *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 575, HL.

5 The cases cited in note 2 supra involve promissory conditions, ie the party who failed to perform was, or would be, liable in damages. As to contingent conditions (ie where non-performance merely releases the other party) see para 962 ante. For examples of contingent conditions see *Cutter v Powell* (1795) 6 Term Rep 320 (death of sailor); *Poussard v Spiers and Pond* (1876) 1 QBD 410 (illness of opera singer rendering her unable to appear at first performance); and see *Jowett v Spencer* (1847) 1 Exch 647, Ex Ch; *Dean and Chapter of Bristol v Jones* (1859) 1 E & E 484.

As to the doctrine of frustration see para 897 et seq ante.

## **UPDATE**

### **991 Failure of condition precedent**

NOTE 2--See *Oceanfocus Shipping Ltd v Hyundai Merchant Marine Co Ltd; The Hawk* [1999] 1 Lloyd's Rep 176 (stipulation that bill of lading be authorised by charterparty not condition precedent to recovery under inter-club agreement).

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## 992. Failure of consideration.

Where there is an entire obligation<sup>1</sup> the courts have sometimes proceeded by considering whether the failure of performance on the part of one party constitutes a failure of the consideration to be provided by him under the contract.

At this point, a distinction must be drawn between the law of contract and restitution<sup>2</sup>. Under the law of contract, when the rights of the parties under the contract are being considered (typically in respect of a payment of money), subject to the doctrines of *de minimis*<sup>3</sup> and substantial performance<sup>4</sup>, failure to perform part of the entire obligation or contract constitutes failure to perform the whole<sup>5</sup>. There is no separate category of deliberate breach<sup>6</sup>, though the fact that a breach is deliberate may be a relevant factor<sup>7</sup>. However, there would appear to be a category of frustrating breaches, which must be distinguished from other breaches because they automatically bring the contract to an end<sup>8</sup>.

In contrast, a restitutionary claim may be available on grounds of total failure of consideration where there has never been any agreement<sup>9</sup>, a contract has been rescinded *ab initio*<sup>10</sup>, or it has been discharged without completed performance<sup>11</sup>. The essence of this claim is that one contracting party (A) has received under the contract a benefit from the other contracting party (B), for which B has received none of the contracted-for benefit in return<sup>12</sup>. In this circumstance, B may be able to recover that benefit from A on grounds of total failure of consideration<sup>13</sup>. Crucial to such recovery by B is the question whether or not the failure of consideration has been total: B may be able to recover where the failure is total<sup>14</sup>, but he will not be able to do so where it is only partial<sup>15</sup>. The test is not whether A has received any benefit from B<sup>16</sup>, but whether he has received any part of the contracted-for benefit<sup>17</sup>. Thus in a simple sale of goods or land, the question whether the buyer can recover the price paid in restitution will depend on whether he has obtained (and retained) the ownership of the goods or land, that being the substance of the transaction<sup>18</sup>. However, in a contract for the design, construction and supply of a vessel, there will be no total failure of consideration where the shipyard has designed and partially constructed the ship before the contract is discharged, notwithstanding that the buyer never acquired the property in the ship<sup>19</sup>.

1 See para 922 ante.

2 Even though A may be entitled to recover or retain moneys as debts arising under the contract (see para 942 ante), it may be that in the situation which has occurred there has been a total failure of consideration in the restitutionary sense. If so, any sum theoretically recovered or retained by A in contract would be immediately recoverable by B in restitution. In such a case, it may be that a court would not make any award to A under the debt claim, on the basis that a court will do nothing in vain.

As to restitution see RESTITUTION.

3 See para 921 note 17 ante.

4 See para 924 ante.

5 *Hoare v Rennie* (1859) 5 H & N 19 (instalment sale; defective first instalment) (doubted in *Simpson v Crippin* (1872) LR 8 QB 14); *Ellen v Topp* (1851) 6 Exch 424, Ex Ch (apprenticeship); *Chanter v Leese* (1840) 5 M & W 698, Ex Ch (right to use collection of patents); and see para 994 text and note 7 post. In *Boone v Eyre* (1779) 1 Hy Bl 273n and *Poussard v Spiers and Pond* (1876) 1 QBD 410, the notions of condition precedent and failure of consideration were run together and treated as susceptible of statement in terms of one idea.

6 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 435, [1966] 2 All ER 61 at 94, HL, per Lord Wilberforce.

7 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 394, [1966] 2 All ER 61 at 94, HL, per Viscount Dilhorne, and at 429 and 90 per Lord Upjohn. It may be evidence of an intention to renounce the contract: see para 999 post.

8 See para 899 ante.

9 *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552, [1968] 3 All ER 104, HL (where the parties never arrived at consensus: see para 703 ante).

10 See para 986 ante.

11 A contract may be discharged without performance by frustration (see para 897 et seq ante), or by rescission de futuro for breach (see para 1002 post).

12 The meaning of consideration in the context of formation of contract differs from its meaning here (in restitution). In the context of formation it may mean the promise itself; here it means the performance of the promise: see *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 48, [1942] 2 All ER 122 at 129, HL, per Viscount Simon LC; and see further para 912 ante.

13 See generally RESTITUTION vol 40(1) (2007 reissue) para 87 et seq.

14 See eg *Rowland v Divall* [1923] 2 KB 500, CA (seller had no title to goods); and paras 1129-1131 post.

15 See eg the following hire-purchase cases: *Kelly v Lombard Banking Ltd* [1958] 3 All ER 713, [1959] 1 WLR 41, CA (hirer enjoyed possession; but no exercise of option to purchase); *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281, CA (hirer retained for some time, but could not enjoy unroadworthy car; overtaken by statute and overruled on other grounds); and RESTITUTION vol 40(1) (2007 Reissue) paras 94-95.

16 See *Branwhite v Worcester Works Finance Ltd* [1969] AC 552, [1968] 3 All ER 104, HL.

17 '[T]he test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which payment is due': *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883 at 896, [1998] 1 WLR 575 at 588-589, HL, per Lord Goff of Chieveley; and see also the dicta at 908 and 600 per Lord Lloyd.

18 See eg *Rowland v Divall* [1923] 2 KB 500, CA (seller had no title to car sold); *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694 (hirer under a hire-purchase agreement enjoyed 11 months' undisturbed possession of car to which his supplier had no title; held a total failure of consideration).

19 *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 575, HL.

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### 993. Conditions and warranties.

Where the common law rules are applicable<sup>1</sup>, the predominant modern approach appears to be to consider the nature of the terms of the contract in order to decide whether those terms are conditions or warranties<sup>2</sup>.

Prima facie, a breach of condition entitles the innocent party to rescind<sup>3</sup> the contract and claim damages for any loss he may have suffered<sup>4</sup>, whereas a breach of warranty only entitles him to damages<sup>5</sup>. Such an analysis is only applicable to bilateral or synallagmatic<sup>6</sup> contracts; in the case of a unilateral contract<sup>7</sup> it is inapt to apply such definition to the question whether failure on the part of the promisee<sup>8</sup> to do or refrain from doing something releases the promisor from the duty of further performance, for the promisee is under no obligation to do or refrain from doing any act at all<sup>9</sup>.

Such a priori classification has the merit of encouraging certainty, since from the moment the contract is made all parties will know what will be the effect of any breach of the term so classified<sup>10</sup>. Terms may be classified by statute, by agreement between the parties, or by judicial decision<sup>11</sup>. However, the expressions 'condition' and 'warranty' are used in different senses in the law of insurance<sup>12</sup>.

1 The common law rules may be ousted by the express contractual regime: see para 990 ante.

2 As to the criteria for distinguishing between conditions and warranties see para 994 post. As to the alternative approach of innominate terms see para 995 post.

3 However, the right to rescind may be lost: see paras 1010-1011 post.

4 *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1013, CA, per Fletcher Moulton LJ; approved on appeal [1911] AC 394, HL. But cf para 995 post. In certain cases a frustrating breach itself may terminate the contract without room for election by the innocent party: see para 899 ante.

As to the consequences of rescission for breach of contract see para 1002 et seq post. As to damages for breach of contract see para 1012 post; and DAMAGES.

5 See eg *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL; *Levison v Farin* [1978] 2 All ER 1149; *Anglia Commercial Properties Ltd v North East Essex Building Co Ltd* [1983] 1 EGLR 151, (1982) 266 Estates Gazette 1096.

6 As to synallagmatic contracts see para 606 ante.

7 As to unilateral contracts see para 606 ante.

8 This analysis could be applied in a unilateral contract to any minor promise by the promisor.

9 *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104 at 109, [1968] 1 WLR 74 at 84, CA, obiter per Diplock LJ.

10 See *A/S Awilco of Oslo v Fulvia Spa, The Chikuma* [1981] 1 All ER 652 at 658-659, [1981] 1 WLR 314 at 322, HL, per Lord Bridge; *Bunge Corpn v Tradax SA* [1981] 2 All ER 513 at 541, 544, 545, 549, sub nom *Bunge Corpn, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 at 715, 718, 720, 725, HL; *Cie Commerciale Sucre et Denrées v C Czarnikow Ltd, The Naxos* [1990] 3 All ER 641 at 650, [1990] 1 WLR 1337 at 1348, HL, per Lord Ackner; *Richco International Ltd v Bunge & Co Ltd, The New Prosper* [1991] 2 Lloyd's Rep 93 at 99.

11 As to the criteria for distinguishing between conditions and warranties see para 994 post.



12 In insurance a condition is a term any breach of which by the insured will provide the insurer with a defence to a claim; a warranty is a term the breach of which by the insured will afford the insurer a defence if there is a causal link between the breach and the loss: see *Lane (W & J) v Spratt* [1970] 2 QB 480, [1970] 1 All ER 162; and INSURANCE vol 25 (2003 Reissue) para 93 et seq.

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#### **994. Criteria for distinguishing between conditions and warranties.**

During the nineteenth century, the courts began to develop the means of classifying terms as conditions or warranties<sup>1</sup>. In modern law, terms may be classified by statute<sup>2</sup>, agreement<sup>3</sup> or common law<sup>4</sup>.

First, in the case of some types of contract (in particular in relation to sale and supply of goods) certain implied terms have been classified by statute as conditions or warranties<sup>5</sup>. However, in modern law, there are restrictions on the ability of the parties to contract out of these statutorily implied terms<sup>6</sup>. Perhaps the foremost twentieth century judicial formulation of the dichotomy is as follows<sup>7</sup>. Contractual obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are obligations under the contract, and breach of any one of them entitles the other party to damages, but in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and may refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract.

Secondly, an express term may be designated in the contract as a condition, in which case the courts may give effect to it as such<sup>8</sup>, though the fact that a term is called a 'condition' or a 'warranty' is not necessarily decisive as to its status<sup>9</sup>. A contract may contain a cancellation clause operative in the event of non-compliance with certain stipulations<sup>10</sup>.

Thirdly, common terms in certain types of contracts (eg charterparties<sup>11</sup> and contracts of international sale<sup>12</sup>) have, by the process of judicial decision, acquired the status of conditions or warranties and, in the absence of clear evidence of a contrary intention, will continue to be treated accordingly<sup>13</sup>.

Where the status of a term cannot be classified under the above rules<sup>14</sup>, the question whether a term is a condition or a warranty depends upon the intention of the parties as revealed by the construction of the contract<sup>15</sup>. Where the contract contains no indication on its face of the status of the terms, the court must look at the contract in the light of the surrounding circumstances in order to decide the intention of the parties<sup>16</sup>. Important factors to be taken into consideration are the extent to which the fulfilment of the term would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out<sup>17</sup>, and whether the obligation arising from the term goes so directly to the substance of the contract that its non-performance may fairly be considered as a substantial failure to perform the contract at all<sup>18</sup>. If a term is then classified as a condition, it is unnecessary for the innocent party rescinding in a particular case to show that the consequences of the breach go substantially to the root of the contract<sup>19</sup>, or even cause him any damage at all<sup>20</sup>.

1 See *Graves v Legg* (1854) 9 Exch 709 at 716; *Bettini v Gye* (1876) 1 QBD 183 at 188 per Blackburn J; *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281, CA, per Bowen LJ.

2 See the text and notes 5-7 *infra*.

3 See the text and notes 8-10 *infra*.

4 See the text and notes 11-13 *infra*.

5 See eg the Sale of Goods Act 1893 ss 10-15 (repealed). Section 11 (repealed) defined 'condition' by implication as a term 'the breach of which may give rise to a right to treat the contract as repudiated', and 'warranty' as a term 'the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated'. The Sale of Goods Act 1979 now defines 'warranty' as regards England, Wales and Northern Ireland as an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated: see s 61(1); para 781 *ante*; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 63.

6 See para 826 *ante*.

7 *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at 1012, CA, per Fletcher Moulton LJ; approved on appeal [1911] AC 394, HL (sale of goods case). As to the failure of consideration see para 992 *ante*.

8 *Bettini v Gye* (1876) 1 QBD 183 at 187; *Financings Ltd v Baldock* [1963] 2 QB 104 at 120, [1963] 1 All ER 443 at 451, CA; *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA. As to the application of the *contra proferentem* rule to exclusion clauses see para 803 *ante*.

9 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL. 'Conditions' is often used to mean no more than the 'terms' of the agreement, eg in the National Conditions of Sale; *Schuler AG v Wickman Machine Tool Sales Ltd* *supra* at 56 and at 702 per Lord Simon. As to the construction of contracts see generally para 772 *et seq* *ante*.

10 See eg *The Helvetia-NV* [1960] 1 Lloyd's Rep 540 (charterparty); *Okura & Co Ltd v Navara Shipping Corp'n SA* [1982] 2 Lloyd's Rep 537, CA; and see further CARRIAGE AND CARRIERS; *Marsden v Sambell* (1880) 43 LT 120 ('forfeiture' clause in building contract); and see further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

11 The 'expected ready to load' clause in a charterparty is a condition: *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, CA. A statement of the present position of a ship is also a condition: *Behn v Burness* (1863) 3 B & S 751, Ex Ch. As to clauses not construed as conditions see note 15 *infra*; and as to the seaworthiness stipulation see para 995 *post*. See further CARRIAGE AND CARRIERS.

12 See eg *Tsakiroglou & Co Ltd v Transgrains SA* [1958] 1 Lloyd's Rep 562 (duty of buyers in cif contract to nominate port of destination before commencement of shipment period a condition); *Gill & Duffus SA v Société pour l'Exploration des Sucres SA* [1986] 1 Lloyd's Rep 322, CA (fob seller to deliver 'at latest'); *Alfred C Toepfer (Hamburg) v Lenersan-Poortman NV (Rotterdam)* [1980] 1 Lloyd's Rep 143, CA. The Uniform Laws on International Sales Act 1967 s 1(1), Sch 1 does not adopt the terminology of condition and warranty: see paras 629, 684 *ante*; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 382.

13 *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 199-200, [1970] 3 All ER 125 at 134, CA, per Edmund Davies LJ, and at 205-206 and at 138 per Megaw LJ.

14 The court may not wish to classify the term: see para 995 *post*.

15 The test may not be quite so strict in other commercial contracts as in sales of goods: *Reardon Smith Line Ltd v Hansen-Tansen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, HL (charterparty); cf *Bunge Corp'n v Tradax SA* [1981] 2 All ER 513, sub nom *Bunge Corp'n, New York v Tradax Export SA, Panama* [1981] 1 WLR 711, HL. Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract: Sale of Goods Act 1979 s 11(3); and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 63-64, 284. As to business sales of goods see para 995 *text* to note 24 *post*.

16 *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281, CA, per Bowen LJ; and see *Tarrabochia v Hickie* (1856) 1 H & N 183; *Bannerman v White* (1861) 10 CBNS 844; *Thomson v Weems* (1884) 9 App Cas 671, HL; *Bunge Corp'n v Tradax SA* [1981] 2 All ER 513, sub nom *Bunge Corp'n, New York v Tradax Export SA, Panama* [1981] 1 WLR 711, HL.

17 *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281, CA, per Bowen LJ.

18 See note 7 supra. This is normally the case with a time obligation in a commercial contract: see *Cie Commerciale Sucres et Denrées v C Czarnikow Ltd, The Naxos* [1990] 3 All ER 641, [1990] 1 WLR 1337, HL; and para 932 notes 5-8 ante.

19 *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalios Angelos* [1971] 1 QB 164 at 205, [1970] 3 All ER 125 at 138, CA, per Megaw LJ; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 270-271, [1973] 2 All ER 39 at 62, HL, per Lord Kilbrandon.

20 *Wickman Machine Tool Sales Ltd v L Schuler AG* [1972] 2 All ER 1173 at 1180, [1972] 1 WLR 840 at 851, CA, per Lord Denning MR; affd sub nom *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL; and see *Re Moore & Co and Landauer & Co* [1921] 2 KB 519, CA; and SALE OF GOODS AND SUPPLY OF SERVICES.

## UPDATE

### **994-995 Criteria for distinguishing between conditions and warranties, Innominate or intermediate terms**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### 995. Innominate or intermediate terms.

Although the distinction between conditions and warranties occupies an important place in the law of contract<sup>1</sup>, it cannot be regarded as applicable to all breaches of all types of contracts<sup>2</sup>. Some contractual undertakings are too complex to be fitted into that scheme and the legal consequences of breach of such an undertaking, unless provided for expressly in the contract<sup>3</sup>, depend not upon any prior classification of the undertaking as a condition or warranty but upon the effect of the breach<sup>4</sup>. This 'wait-and-see' approach achieves greater justice between the parties than is possible by an a priori classification<sup>5</sup>.

After a number of earlier formulations of this wait-and-see rule<sup>6</sup>, the modern form of the rule was laid down in 1962<sup>7</sup>. If the breach deprives the innocent party of substantially the whole benefit of the contract<sup>8</sup> or, in other words, if it goes so much to the root of the contract<sup>9</sup> that it makes further commercial performance of the contract impossible<sup>10</sup>, in addition to any remedy in damages the innocent party will be entitled to be discharged from further obligation; but, if the event does not have that effect, its consequences can be remedied only by an award of damages<sup>11</sup>.

Terms which fall within this category have been variously described as 'innominate' or 'intermediate'<sup>12</sup> and include the following: the implied undertaking in a charterparty as to seaworthiness<sup>13</sup> or as to where the chartered ship is built<sup>14</sup>; to load containers without any stability problem<sup>15</sup> or to carry out the agreed voyage with reasonable dispatch<sup>16</sup>; to ship goods in good condition<sup>17</sup>; for the ship's master to carry out the charterer's orders<sup>18</sup>; to give notice<sup>19</sup>; that in an international sale the seller will accept nomination of a port within five days<sup>20</sup>; and to provide a quality certificate<sup>21</sup>.

However, though such 'innominate' terms occupy a large category of contractual undertakings, they have not replaced the traditional classification into conditions and warranties in those areas where such a division has been made by statute or judicial decision<sup>22</sup>; that classification has the merit of predictability, which is important in relation to contractual clauses in common use<sup>23</sup>. It is for consideration how the attitude of the courts to classifying terms and their breaches will be affected by the new statutory rules for a 'slight' breach of condition in business sales of goods<sup>24</sup> and notions of good faith dealings<sup>25</sup>.

1 See para 994 ante.

2 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70, [1962] 1 All ER 474 at 487, CA, per Diplock LJ; *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 193, [1970] 3 All ER 125 at 128, CA, per Lord Denning MR.

3 Eg by a cancellation clause: see para 994 ante.

4 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70, [1962] 1 All ER 474 at 487, CA, per Diplock LJ. In this case the charterers claimed to be discharged from the charterparty by reason of a breach of the undertaking as to seaworthiness in that the vessel was delayed in port; but the court held that the delay was not such as to substantially deprive the charterers of the whole benefit of the charterparty so that they were only entitled to damages.

5 Under an a priori classification, any breach of condition, however slight, gives a prima facie right to rescind de futuro; and any breach of warranty, however serious, does not: see para 994 ante.

6 Eg whether the breach of the term in question goes 'to the root of the contract' (see *Davidson v Gwynne* (1810) 12 East 381 at 388; *MacAndrew v Chapple* (1866) LR 1 CP 643 at 648; *Poussard v Spiers* (1876) 1 QBD 410 at 414; *Honck v Muller* (1881) 7 QBD 92 at 100, CA; *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 443, HL; *Guy-Pell v Foster* [1930] 2 Ch 169 at 187, CA; *Heyman v Darwins Ltd* [1942] AC 356 at 397, HL; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 391, [1966] 2 All ER 61 at 66, HL; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 227, [1971] 1 WLR 361 at 374, CA; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 at 60, 73, [1975] 3 All ER 739 at 747, 757, CA; *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1979] AC 757 at 779, [1979] 1 All ER 307 at 314, HL) or whether it affected 'the very substance of the contract' (see para 994 ante) or would 'frustrate the commercial purpose of the venture' (see *Tarrabochia v Hickie* (1856) 1 H & N 183; *MacAndrew v Chapple* (1866) LR 1 CP 643 at 648; *Stanton v Richardson* (1874) LR 7 CP 421 at 433, 437; *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125 at 145, 148, Ex Ch; *Inverskip Steamship Co Ltd v Bunge* [1917] 2 KB 193 at 201, CA; *Astley Industrial Trust Ltd v Grimley* [1963] 2 All ER 33 at 47, [1963] 1 WLR 584 at 599, CA; *Trade and Transport Inc v Iino Kaiun Kaisha Ltd, The Angelia* [1973] 2 All ER 144 at 156, [1973] 1 WLR 210 at 223).

7 *Hong Kong Fir Shipping Co Ltd v Kawaski Kisen Kaisha Ltd* [1962] 2 QB 26 at 66, [1962] 1 All ER 474 at 485, CA, per Diplock LJ. This dictum received judicial approval in the following cases: *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 at 82, [1975] 3 All ER 739 at 765, CA; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 928 [1977] 2 All ER 62 at 70, HL; see also *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849, [1980] 1 All ER 556 at 566, HL.

8 *Hong Kong Fir Shipping Co Ltd v Kawaski Kisen Kaisha Ltd* [1962] 2 QB 26 at 66, [1962] 1 All ER 474 at 485, CA, per Diplock LJ. See para 992 ante. See also *Aerial Advertising Co v Batchelor's Peas Ltd (Manchester)* [1938] 2 All ER 788 (aerial advertising campaign; unauthorised flight during two minutes' armistice silence). For the principles applicable to sales of goods where delivery and payment are to be by instalments see the Sale of Goods Act 1979 s 31; para 998 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 169, 176, 187.

9 *Hong Kong Fir Shipping Co Ltd v Kawaski Kisen Kaisha Ltd* [1962] 2 QB 26 at 64, [1962] 1 All ER 474 at 484, CA, per Upjohn LJ; and see *Goldby v Nelson's Theatre and Travel Agency Ltd* (1967) 111 Sol Jo 470, CA; *SJ and MM Price Ltd v Milner* (1968) 206 Estates Gazette 313.

10 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 64, [1962] 1 All ER 474 at 484, CA, per Upjohn LJ; *Davidson v Gwynne* (1810) 12 East 381 at 389, per Lord Ellenborough CJ; *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 443, 444, HL, per Lord Blackburn; *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 193, [1970] 3 All ER 125 at 128, CA, per Lord Denning MR; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 221-222, [1971] 1 WLR 361 at 368, CA, per Salmon LJ, and at 227 and at 374 per Sachs LJ; cf at 232 and 380 per Buckley LJ ('will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to the remedy in damages as and when a breach or breaches may occur?').

11 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, CA.

12 *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 at 60, [1975] 3 All ER 739 at 746, CA; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 113, HL; *Bunge Corp v Tradax SA* [1981] 2 All ER 513 at 541, 542-543, 544, 548-549, sub nom *Bunge Corp v New York v Tradax Export SA, Panama* [1981] 1 WLR 711 at 714, 717, 719, 724, HL; *Aktion Maritime Corp of Liberia v S Kasma & Bros Ltd, The Aktion* [1987] 1 Lloyd's Rep 283 at 292; *Phibro Energy AG v Nissho Iwai Corp and Bomar Oil Inc, The Honam Jade* [1991] 1 Lloyd's Rep 38 at 58, CA.

13 *Hong Kong Fir Shipping Co Ltd v Kawaski Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474, CA.

14 *Reardon Smith Line Ltd v Yngvar Hansen-Tansen (t/a HE Hansen-Tansen)* [1976] 3 All ER 570, [1976] 1 WLR 989, HL.

15 *Compagnie Generale Maritime v Diakan Spirit SA, The Ymnos* [1982] 2 Lloyd's Rep 574.

16 *Freeman v Taylor* (1831) 8 Bing 124; *Clipsham v Vertue* (1843) 5 QB 265; *MacAndrew v Chapple* (1866) LR 1 CP 643 at 648.

17 *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, [1975] 3 All ER 739, CA.

18 *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1979] AC 757, [1979] 1 All ER 307, HL.

19 *Daulatram Rameshwarlall v European Grain and Shipping Ltd* [1971] 1 Lloyd's Rep 368 (cif contract; declaration of shipment to be made by cable, telegram or telex; but in fact only made by letter); and see para 965 ante.

20 *Phibro Energy AG v Nissho Iwai Corp'n, The Honam Jade* [1991] 1 Lloyd's Rep 38, CA; cf note 24 infra.

21 *Tradax International SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604; cf note 24 infra.

22 *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, CA; *Bunge Corp'n v Tradax SA* [1981] 2 All ER 513, sub nom *Bunge Corp'n, New York v Tradax Export SA, Panama* [1981] 1 WLR 711, HL.

23 *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 205, [1970] 3 All ER 125 at 138, CA, per Megaw LJ; cf *Daulatram Rameshwarlall v European Grain and Shipping Ltd* [1971] 1 Lloyd's Rep 368. See also *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 264-265, [1973] 2 All ER 39 at 56, HL, per Lord Simon.

24 See the Sale of Goods Act 1979 s 15A (as added); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 63-64.

25 See para 613 ante.

## UPDATE

### **994-995 Criteria for distinguishing between conditions and warranties, Innominate or intermediate terms**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **995 Innominate or intermediate terms**

NOTE 13--See, however, *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (No 2), The Seaflower*, [2001] 1 All ER (Comm) 240, [2001] 1 Lloyd's Rep 341, CA (shipowner's guarantee to obtain approval of vessel by oil company is a condition).

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### 996. Fundamental breach.

The terminology of 'fundamental breach' and 'breach of a fundamental term', which was originally adopted to deal with problems created by wide exclusion clauses<sup>1</sup>, has also been brought into service to determine whether a breach of contract is sufficiently serious to justify the innocent party in treating himself as discharged from further obligations under the contract<sup>2</sup>.

It has been said that a fundamental term is no more than a condition<sup>3</sup>, that is a term which the parties have agreed either expressly or impliedly goes to the root of the contract, so that any breach of that term, without reference to the facts and circumstances, will allow the innocent party to treat himself as discharged<sup>4</sup>. Similarly, there will be a fundamental breach in this sense, entitling the innocent party to be discharged, if the breach has produced a situation fundamentally different from anything which the parties could, as reasonable persons, have contemplated when the contract was made<sup>5</sup>.

However, it has now been settled that a fundamental breach is no more than a repudiatory breach<sup>6</sup>. It follows that there is no separate category of 'fundamental terms' or 'fundamental breaches'<sup>7</sup>.

1 See para 805 ante.

2 See eg *Donovan v Invicta Airways Ltd* [1969] 2 Lloyd's Rep 413 (revsd on the facts [1970] 1 Lloyd's Rep 486, CA); *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 at 472, [1970] 1 All ER 225 at 239-240, CA, per Widgery LJ; *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, [1974] 1 WLR 331.

3 As to conditions and warranties see paras 994-995 ante.

4 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 422, [1966] 2 All ER 61 at 86, HL, per Lord Upjohn; and see para 805 ante.

5 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 397-398, [1966] 2 All ER 61 at 70, HL, per Lord Reid, at 421-422 and at 86 per Lord Upjohn and at 431 and at 91 per Lord Wilberforce; and see para 812 ante.

6 *Photoproduction Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL; and see paras 805, 812 ante.

7 See eg *Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422; *Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475, [1985] 1 WLR 435, CA; and see para 812 ante.



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### **C. REPUDIATION**

#### **997. Repudiation and anticipatory breach.**

Instead of merely failing to provide due performance at the stipulated time<sup>1</sup>, one party (A) may put himself in breach by evincing an intention, by words or conduct, of repudiating his obligations under the contract in some essential respect<sup>2</sup>. Repudiation is a serious matter, not to be lightly found or inferred<sup>3</sup>. Such repudiation may occur at the time fixed for performance or before that time<sup>4</sup>; in the latter case it is known as 'anticipatory breach' or 'anticipatory repudiation'<sup>5</sup>.

Repudiation<sup>6</sup> will give the innocent party (B) the right to treat the contract as discharged<sup>7</sup> and claim damages<sup>8</sup>. Repudiation may be express or implied<sup>9</sup>.

1 See para 990 et seq ante.

2 *Mersey Steel and Iron Co v Naylor, Benzon & Co*(1884) 9 App Cas 434 at 438, HL, per Lord Selbourne LC.

3 *Ross T Smyth & Co Ltd v Bailey, Son & Co*[1940] 3 All ER 60 at 71, 164 LT 102 at 107, HL, per Lord Wright.

4 *Heyman v Darwins Ltd*[1942] AC 356 at 397, [1942] 1 All ER 337 at 360, HL, per Lord Porter.

5 For the consequences of anticipatory breach see para 1005 post. An anticipatory breach usually involves a repudiation, but need not do so: see para 1001 post.

6 For the principle that a repudiation must go to the root of the contract see paras 998, 1001 note 7 post.

7 *Freeth v Burr*(1874) LR 9 CP 208 at 214; *Thompson v Caroon* (1993) 66 P & CR 445, PC. See paras 1002-1005 post.

8 See para 1012 post.

9 See para 999 post.

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### **998. Repudiation must go to the root of the contract.**

Not every refusal by A to perform a part of the contract amounts to a repudiation which entitles the other party (B) to treat the contract as at an end; there must be a refusal to perform something which goes to the root or essence of the contract<sup>1</sup>. Thus it is not just any delay in breach of contract which amounts to a repudiation, but only such delay as would frustrate the adventure<sup>2</sup>.

The question whether the refusal to perform part of the contract amounts to a repudiation of the whole contract depends on the construction of the contract and the circumstances of the case<sup>3</sup>. The test is the same for both repudiation and anticipatory breach<sup>4</sup>. If the agreement is an entire contract<sup>5</sup>, the test is applied to repudiation of any part of it<sup>6</sup>. If the agreement is construed as a series of separate contracts<sup>7</sup>, prima facie no breach of one contract can be a repudiation of the others; whereas, if the contract is divisible<sup>8</sup>, the question is whether repudiation of a divisible part shows an intention to repudiate the contract as a whole<sup>9</sup>.

Thus, if in a contract for the sale of goods to be delivered by instalments, which are to be separately paid for, the seller makes defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of, or to pay for, one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated<sup>10</sup>. The main tests in deciding this issue are the ratio quantitatively which the breach bears to the contract as a whole and the degree of probability or improbability that such a breach will be repeated<sup>11</sup>. In relation to payment, if the breaches are such as to destroy the innocent party's confidence in the defaulting party's creditworthiness the breach will be treated as going to the root of the contract<sup>12</sup>.

The mere fact that similar breaches, however slight, are threatened in the future does not necessarily amount to a repudiation<sup>13</sup>.

1 *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 443, HL, per Lord Blackburn; *Rhymney Rly Co v Brecon and Merthyr Tydfil Junction Rly Co* (1900) 69 LJ Ch 813, CA; *Cornwall v Henson* [1900] 2 Ch 298 at 303, CA, per Collins LJ; *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330, PC; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA; and see the cases cited note 2 infra; and in para 999 post.

If the term breached is not a condition, the breach is less likely to be repudiatory: *The Sara D* [1989] CLY 415, CA. But see *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1979] AC 757, [1979] 1 All ER 307, HL.

2 *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70 (affd on other grounds [1957] 3 All ER 234, [1957] 1 WLR 979, CA); *Unitramp v Garnac Grain Co Inc, The Hermine* [1979] 1 Lloyd's Rep 212, CA; *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd, The Hermosa* [1982] 1 Lloyd's Rep 570, CA.

The sale of a company's business, even as a going concern, will operate as a repudiation of the contracts of service of the company's employees: *Re Foster Clark Ltd's Indenture Trusts, Loveland v Horscroft* [1966] 1 All ER 43, [1966] 1 WLR 125. Where the employee is sentenced to imprisonment this will amount to a repudiation of a contract of employment: *Hare v Murphy Bros Ltd* [1974] 3 All ER 940, [1973] ICR 331, CA. See also *Bliss v South East Thames Regional Health Authority* [1987] ICR 700, CA (employer requiring employee to undergo a psychiatric examination held to be a breach of the implied term not to undermine the relationship of trust and confidence). As to the effect of repudiation on a contract of employment see para 1002 note 10 post.

Breach of a promise by a buyer to pay a deposit has been held to be a repudiation: *Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475, [1985] 1 WLR 435, CA. Similarly, so has an interference by the owner with the charterer's primary right to use the vessel as he thought fit: *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1979] AC 757, [1979] 1 All ER 307, HL. Repudiations have also included a developer going to some lengths to avoid his obligation to build (*Thompson v Caroon* (1993) 66 P & CR 445, PC) and the dissolution of a partnership without the required notice (*Hurst v Bryk* [1997] 2 All ER 283, [1998] 1 WLR 434, CA).

3 *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 438-439, HL, per Lord Selborne LC; *James Shaffer Ltd v Findlay Durham and Brodie* [1953] 1 WLR 106, CA; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA.

For cases where no repudiation was found see para 999 note 10 post.

4 See para 1001 text and note 4 post.

5 As to entire contracts see para 922 ante.

6 *Ebbw Vale Steel, Iron and Coal Co Ltd v Blaina Iron and Tinplate Co Ltd* (1901) 6 Com Cas 33, CA; *H Longbottom & Co v Bass, Walker & Co* [1922] WN 245, CA.

7 However, this is an unlikely construction: see *J Rosenthal & Sons Ltd v Esmail* [1965] 2 All ER 860, [1965] 1 WLR 1117, HL.

8 As to divisible contracts see para 922 ante.

9 *Freeth v Burr* (1878) LR 9 CP 208 at 213-214; and see para 1001 post.

10 See the Sale of Goods Act 1979 s 31(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 187.

11 *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148, CA; *Robert A Munro & Co Ltd v Meyer* [1930] 2 KB 312. See also *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA (distribution agreement involving periodic sales of goods; failure to pay for some instalments on due date; note that although the contract was not governed by the Sale of Goods Act 1893 (now repealed), Salmon LJ referred to s 10(1) (now repealed and consolidated in the Sale of Goods Act 1979 s 10(1)) (stipulation as to time of payment not deemed to be of the essence of contract of sale)).

As to whether breach in respect of the first instalment is more serious than breach in respect of a later instalment see *Hoare v Rennie* (1859) 5 H & N 19 and *Simpson v Crippen* (1872) LR 8 QB 14; and see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 187.

12 *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 222, [1971] 1 WLR 361 at 369, CA, per Salmon LJ; cf *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA.

13 *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216, [1971] 1 WLR 361, CA; commenting on *Millar's Karri and Jarrah Co (1902) v Weddel, Turner & Co* (1908) 100 LT 128.

## UPDATE

### 998 Repudiation must go to the root of the contract

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--Where the contract in question essentially results in a joint effort between the parties, failure to co-operate with, or act as part of, that venture amounts to repudiation: *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] UKPC 50, [2002] 2 All ER (Comm) 849 (franchise agreement).

NOTE 2--*Hurst v Bryk*, cited, affirmed: [2000] 2 WLR 740, HL.

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### 999. Express and implied repudiation.

Repudiation may be an express renunciation of contractual obligations by one party (A)<sup>1</sup>. This will be so whether A absolutely refuses to perform his side of the bargain<sup>2</sup> or unambiguously asserts that he will be unable to do so<sup>3</sup>. However, it is more commonly implied from failure to render due performance<sup>4</sup> or, in cases of anticipatory repudiation<sup>5</sup>, by the party in default putting himself in such a position that he will apparently be unable to perform when the time comes. A party (B) seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable person to believe that he will not perform<sup>6</sup> or will be unable to perform at the stipulated time<sup>7</sup>; as where A refuses to perform unless B complies with requirements not contained in the contract<sup>8</sup>. The fact that a breach is deliberate will not necessarily amount to a repudiation<sup>9</sup>; nor will words and conduct which do not amount to a renunciation of the contract<sup>10</sup>.

Where the parties genuinely differ as to the meaning of the contract a party will not necessarily be treated as having repudiated if he refuses to perform except according to his own bona fide interpretation of the contract<sup>11</sup>, although that interpretation turns out to be erroneous<sup>12</sup>. Where one party to a contract conceives that he is no longer bound by it, or has a right to rescind it or have it declared null and void, and issues a writ for the purpose of obtaining that which he believes to be his right, he does not thereby repudiate the contract in any event<sup>13</sup>. The issue of a writ by an employee in respect of a claim for accrued wages does not represent a repudiation by him of his contract of service<sup>14</sup>.

A party is not bound before the time for performance to give a definite answer whether he intends to fulfil the contract or not<sup>15</sup>.

1 *Hochster v De la Tour* (1853) 2 E & B 678; *Danube and Black Sea Rly and Kustenjje Harbour Co Ltd v Xenos* (1863) 13 CBNS 825, Ex Ch; *Frost v Knight* (1872) LR 7 Exch 111, Ex Ch; *Bradford v Williams* (1872) LR 7 Exch 259; *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL. A party to a hire-purchase agreement who intimates that he cannot keep up the payments and wishes the agreement to be terminated is not necessarily thereby repudiating the agreement: see *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL; *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54, [1967] 2 All ER 345, CA.

2 *Freeth v Burr* (1874) LR 9 CP 208 at 214; and see *Comet Group plc v British Sky Broadcasting Ltd* [1991] CLY 540.

3 See para 1000 post.

4 See para 1000 note 2 post.

5 See paras 997 ante, 1001 post.

6 *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL (wrongful dismissal a repudiation of contract of service); *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC (wrongful refusal to accept goods); *Omnium d'Enterprises v Sutherland* [1919] 1 KB 618, CA (sale of chartered vessel); and see CARRIAGE AND CARRIERS; *Farshind etc v Bechely-Crundall* 1922 SC 173, HL; *Household Machines Ltd v Cosmos Exporters Ltd* [1947] KB 217, [1946] 2 All ER 622 (refusal to pay for goods); and see SALE OF GOODS AND SUPPLY OF SERVICES; *Thomas Feather & Co (Bradford) Ltd v Keighley Corpn* (1953) 52 LGR 30 (effect of breach of contractor's covenant not to sub-contract); and see further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) para 115; *Universal Cargo Carriers Corpn v Citati* [1957] 2 QB 401, [1957] 2 All ER 70 (affd [1957] 3 All ER 234, [1957] 1 WLR 979, CA); *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, [1959] 1 WLR 698, CA (contract of service; disobedience); *Bowmaker (Commercial) Ltd v Smith* [1965] 2 All ER 304, [1965] 1 WLR 855, CA (sale of car subject to hire-purchase agreement; effect on

recourse agreement); and see CONSUMER CREDIT; *Ditchburn Equipment Co Ltd v Crich* (1966) 110 Sol Jo 266, CA (hire of juke box; breakdown at outset of contract: owner's failure to repair); *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421 (share option); cf *Gorse v Durham County Council* [1971] 2 All ER 666, [1971] 1 WLR 775; and see EMPLOYMENT; *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, [1974] 1 WLR 331 (dishonoured cheque in payment of deposit); and see SALE OF LAND; *Chilean Nitrate Sale Corp v Marine Transportation Co Ltd, The Hermosa* [1982] 1 Lloyd's Rep 570 at 580, CA.

See also *Lines v Rees* (1837) 1 Jur 593 (refusal of present payment under building contract); *Barrick v Buba* (1857) 2 CBNS 563 (statement by charterer that he had assigned charterparty); *Bartholomew v Markwick* (1864) 15 CBNS 711 (sale of goods; refusal to accept balance); *Bradford v Williams* (1872) LR 7 Exch 259 (charterparty; refusal to load from nominated factor); *Bloomer v Bernstein* (1874) LR 9 CP 588; *Morgan v Bain* (1874) LR 10 CP 15; *The Cito* (1881) 7 PD 5, CA (abandonment of chartered vessel by crew); *Cornwall v Henson* [1900] 2 Ch 298, CA (failure to pay last instalment on sale of land).

7 Continuing ability to perform is considered further in para 1000 post.

8 *Spray Processes Ltd v Manro Products Ltd* [1979] Abr para 514 (buyer not entitled to insist on standard of machinery); *BV Oliehandel Jongkind v Coastal International* [1983] 2 Lloyd's Rep 463 (fearing the buyer might go insolvent, the seller demanded payment in advance); *HB Raylor & Co Ltd v Henry Lewis & Son (Wireworks) Ltd* [1987] Abr para 443, [1987] BTLC 70, CA (supplier attempted to require guarantee); *Weeks v Bradshaw* [1993] EGCS 65, CA (caravan site owner demanded premature payment).

9 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL.

10 *Franklin v Miller* (1836) 4 Ad & El 499; *Wilkinson v Clements* (1872) LR 8 Ch App 96; *Re Phoenix Bessemer Steel Co* (1876) 4 ChD 108; *Cornwall v Henson* [1900] 2 Ch 298, CA; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC; *Household Machines Ltd v Cosmos Exporters Ltd* [1947] KB 217, [1946] 2 All ER 622; *Thorpe v Fasey* [1949] Ch 649, [1949] 2 All ER 393; *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 2 All ER 294, [1953] 1 WLR 815, CA; *Warinco AG v Samor SPA* [1977] 2 Lloyd's Rep 582; *Unitramp v Garnac Grain Co Inc, The Hermine* [1979] 1 Lloyd's Rep 212, CA; *Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422; *Vaswani v Italian Motors (Sales and Services) Ltd* [1996] 1 WLR 270 [1996] RTR 115, PC.

11 But it may do so: see *Ross T Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All ER 60 at 72, 164 LT 102 at 107, HL, per Lord Wright; *Evans Marshall & Co Ltd v Bertola SA and Independent Sherry Importers Ltd* [1976] 2 Lloyd's Rep 17, HL; *Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1979] AC 757, [1979] 1 All ER 307, HL.

12 *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277, HL (purchaser of land, having taken legal advice, wrongly purported to rescind purchase); cf *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 2 All ER 294, [1953] 1 WLR 815, CA (refusal by seller's agents to deliver part of goods to buyers owing to mistaken belief that goods were not in his possession; no repudiation, but breach entitling buyers to damages); *James Shaffer Ltd v Findlay Durham and Brodie* [1953] 1 WLR 106, CA; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561 at 570, [1967] 1 WLR 1421 at 1435 per Ungood-Thomas J; *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30, CA; *Orion Finance Ltd v Heritable Finance Ltd* [1997] 5 CL 123, CA (mistaken reliance on collateral agreement not a repudiation).

13 *Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 88 LJKB 1194, CA.

14 *The Fairport* [1967] P 167 at 174, [1966] 2 All ER 1026 at 1032, obiter per Cairns J.

15 *Ripley v M'Clure* (1849) 4 Exch 345; *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434, HL. See also *Freeth v Burr* (1874) LR 9 CP 208 at 213 per Lord Coleridge CJ; *General Billposting Co Ltd v Atkinson* [1909] AC 118 at 122, HL, per Lord Collins.

## UPDATE

### 999 Express and implied repudiation

NOTE 1--*United Dominions*, cited, doubted: *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2010] QB 27, [2009] 2 All ER (Comm) 1129.

NOTE 2--There must be a clear and unequivocal refusal to perform: *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyd's Law Rep 89.

NOTE 6--See also *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] UKPC 50, [2002] 2 All ER (Comm) 849 (failure to pay franchise fees); *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm), (2009) 126 ConLR 130 (failure to supply working oil rig before monsoon season due to negligent damage not repudiation of contract).

NOTES 11, 12--See *Gulf Agri Trade FZCO v Aston Agro Industrial AG* [2008] EWHC 1252 (Comm), [2009] 1 All ER (Comm) 991 (failure to show that it had not been the intention to terminate contract).

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### 1000. Continuing ability to perform.

Unwillingness<sup>1</sup> and inability by A to perform are often difficult to disentangle, for inability may lie at the root of unwillingness<sup>2</sup>. If, therefore, A puts it out of his power to perform<sup>3</sup> or acts in a manner which leads the other reasonably to assume that he will be unable to perform<sup>4</sup>, the other party (B) may be entitled to rescind the contract and recover quantum meruit<sup>5</sup>, even though the disability is not necessarily permanent and A (the defaulting party) may subsequently be in a position to perform the contract<sup>6</sup>. This may be so even though the inability is not deliberate<sup>7</sup>, or even if it extends to part only of A's obligations<sup>8</sup>.

Impossibility<sup>9</sup> of performance created by the act or default of a party of itself constitutes a ground for rescission; but in a case of apparent inability to perform, the innocent party will usually rely on the apparent inability as constituting an anticipatory repudiation by conduct, since he will not then be required to show that performance was in fact impossible at the stipulated time<sup>10</sup>.

It is in general an implied term of a contract that one party will not by his wrongful act prevent the other from performing the contract<sup>11</sup>.

1 See para 999 note 6 ante.

2 It is common for the courts to use the terminology of repudiation in cases of simple failure to perform, without any element of unwillingness. 'Unwillingness and inability are often difficult to disentangle, and it is rarely necessary to make the attempt. Inability often lies at the root of unwillingness to perform': *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 437, [1957] 2 All ER 70 at 85 per Devlin J; affd [1957] 3 All ER 234, [1957] 1 WLR 979, CA. See also *Robert A Munro & Co Ltd v Meyer* [1930] 2 KB 312 at 331 per Wright J. For other uses of 'repudiation' see *Heyman v Darwins Ltd* [1942] AC 356 at 378, [1942] 1 All ER 337 at 350, HL, per Lord Wright; and *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA (no repudiation implied from late payment of hire in charterparty).

3 See eg *Jones v Barkley* (1781) 2 Doug KB 684; *Warburton v Storr* (1825) 4 B & C 103; *Lovelock v Franklyn* (1846) 8 QB 371; *M'Intyre v Belcher* (1863) 14 CBNS 654; *Re Imperial Wine Co, Shirreff's Case* (1872) LR 14 Eq 417; *Re Patent Floor Cloth Co Ltd, Dean and Gilbert's Claim* (1872) 41 LJ Ch 476; *Synge v Synge* [1894] 1 QB 466, CA. In such a case the promisor is taken to have waived performance by the other party of any condition precedent to his liability to perform his promise: *Main's Case* (1596) 5 Co Rep 20b; *Planché v Colburn* (1831) 8 Bing 14; *Pontifex v Wilkinson* (1845) 1 CB 75; *Ripley v M'Clure* (1849) 4 Exch 345; *Cort v Ambergate etc Rly Co* (1851) 17 QB 127; *Bradley v Benjamin* (1877) 46 LJQB 590; *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543, CA; *Omnium d'Enterprises v Sutherland* [1919] 1 KB 618, CA; *Taylor v Oakes, Roncoroni & Co* (1922) 127 LT 267, CA; *Rightside Properties Ltd v Gray* [1974] 2 All ER 1169; *Bournemouth and Boscombe Athletic FC Co Ltd v Manchester United FC Ltd* [1980] Abr para 486, (1980) Times, 22 May, CA. But cf *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 183, [1970] 3 All ER 125, CA; and para 1005 text and note 13 post; and see MG Lloyd 'Ready and Willing to Perform: the Problem of Prospective Liability to Perform in the Law of Contract' (1974) 37 MLR 121.

4 *Farshind etc v Bechely-Crundall* 1922 SC (HL) 173; *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 437, [1957] 2 All ER 70 at 85 (affd [1957] 3 All ER 234, [1957] 1 WLR 979, CA); *Mapes v Jones* (1974) 232 Estates Gazette 717; *Anchor Line Ltd v Keith Rowell Ltd, The Hazelmoor* [1980] 2 Lloyd's Rep 351, CA; *The Munster* [1983] 1 Lloyd's Rep 370, CA; *Texaco Ltd v Eurogulf Shipping Co Ltd* [1987] 2 Lloyd's Rep 541.

5 *Planché v Colburn* (1831) 8 Bing 14; *Lusty (David Michael) v Finsbury Securities Ltd* (1993) 58 BLR 66, CA; and see para 618 ante. As to quantum meruit see RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

6 *Ford v Tiley* (1827) 6 B & C 325; *Short v Stone* (1846) 8 QB 358; *Caines v Smith* (1846) 15 M & W 189; *Bowdell v Parsons* (1808) 10 East 359; *Omnium d'Enterprises v Sutherland* [1919] 1 KB 618, CA.

7 *Keys v Harwood* (1846) 2 CB 905 (before seller could deliver furniture sold, it was seized in execution); *Powell v Marshall, Parkes & Co* [1899] 1 QB 710, CA (bankruptcy); cf *Anchor Line Ltd v Keith Rowell Ltd, The Hazelmoor* [1980] 2 Lloyd's Rep 351, CA (A's letter notifying loss of finance was held not to be an anticipatory breach because it declared he would 'use every endeavour to secure alternative finance'; and this was still possible).

8 *Afovos Shipping Co SA v Pagnan, The Afovos* [1983] 1 All ER 449 at 455, sub nom *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan (t/a R Pagnan & filli)* [1983] 1 WLR 195 at 203, HL.

9 As to the effect of impossibility or frustration caused by the act or default of a party see further paras 891, 899 ante.

10 *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 436-437, [1957] 2 All ER 70 at 84-85 per Devlin J; affd [1957] 3 All ER 234, [1957] 1 WLR 979, CA.

11 See para 786 ante.



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### 1001. Anticipatory breach.

Where repudiation<sup>1</sup> by A (which includes an inability, or apparent inability, to perform<sup>2</sup>) takes place before the time for performance, this is sometimes known as 'anticipatory breach'<sup>3</sup>. In such circumstances, it is said that the innocent party (B) is entitled to anticipate the inevitable breach, from which it follows that there is no distinction between the nature of the repudiation which is required to constitute an anticipatory breach and that which is required where the alleged breach occurs after the time for performance has arisen<sup>4</sup>. The doctrine will operate even though the contract specifies no presently or precisely ascertainable date for performance<sup>5</sup>; but it has no application to a punctual payment of hire clause in a charterparty<sup>6</sup>.

If such a breach by A goes to the root of the contract, B may treat the contract as discharged<sup>7</sup>, though he may usually instead elect to treat the contract as continuing and await the time fixed for performance<sup>8</sup>. There is no clear English authority on whether an anticipatory breach of a minor obligation (hence giving rise to no right to rescind) gives rise to an immediate right to damages<sup>9</sup>.

1 See para 997 et seq ante.

2 See para 1000 ante; and see *The Angelia* [1973] 2 All ER 144, [1973] 1 WLR 210.

3 This terminology has been said to be unfortunate because it is no breach not to do an act at a time when its performance is not yet legally due: *Bradley v H Newsom, Sons & Co* [1919] AC 16 at 53, HL, per Lord Westbury. The cause of action is not in fact the future breach but the renunciation itself: *Maredelanto Campana Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 196, [1970] 3 All ER 125 at 131, CA, per Lord Denning MR, and at 209 and 142 per Megaw LJ. The renunciation is a breach of an implied term that once the contract is concluded neither will do anything inconsistent with the contract: *Hochster v De la Tour* (1853) 2 E & B 678. It could also be seen in terms of good faith dealings: see para 613 ante.

4 *Thorpe v Faisey* [1949] Ch 649 at 661, [1949] 2 All ER 393 at 398; *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 438, [1957] 2 All ER 70 at 85. See *Omnium d'Enterprises v Sutherland* [1919] 1 KB 618, CA where a ship owner agreed to charter a ship, but sold her before the time for commencement of the charter; and see also *Synge v Synge* [1894] 1 QB 466, CA; *Guy-Pell v Foster* [1930] 2 Ch 169, CA. Similarly, where a charterer was bound to nominate a port and load a cargo by a certain day but had not done so by three days before due date, and it was impossible to complete loading within those three days, this was also held to be an anticipatory breach: *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70 (affd [1957] 3 All ER 234, [1957] 1 WLR 979, CA); and see also *Vitol SA v Norelf Ltd, The Santa Clara* [1996] AC 800, [1996] 3 All ER 193, HL. Anticipatory breach was also found where an owner wrongly instructed the masters of the ships not to issue freight pre-paid bills of lading until the hire rent was paid in full: *Federal Commerce & Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri* [1979] AC 757, [1979] 1 All ER 307, HL; and see also *Fercometal SARL v Mediterranean Shipping Co SA, The Simona* [1989] AC 788, [1988] 2 All ER 742, HL.

5 *Frost v Knight* (1872) LR 7 Exch 111, Ex Ch (promise to marry upon death of promisor's father); *Short v Stone* (1846) 8 QB 358 (promise to marry within reasonable time after request); *Lovelock v Franklyn* (1846) 8 QB 371 (promise to assign a lease at any time within seven years at the option of the promisee); *Guy-Pell v Foster* [1930] 2 Ch 169, CA (plaintiff re-bought stock after House of Lords decided that he should not have sold it).

Actions for breach of promise of marriage have now been abolished: see the Law Reform (Miscellaneous Provisions) Act 1970 s 1(1).

6 *Afovos Shipping Co SA v Pagnan, The Afovos* [1983] 1 All ER 449, sub nom *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan (t/a R Pagnan & filli)* [1983] 1 WLR 195, HL.

7 An anticipatory breach must go just as much to the root of the contract as a breach at the time for performance if the innocent party is to be entitled to treat himself as discharged: *Johnstone v Milling* (1886) 16 QBD 460, CA; *Thorpe v Fasey* [1949] Ch 649 at 661, [1949] 2 All ER 393 at 398 per Wynn-Parry J.

8 See para 1005 note 14 post.

9 The point could have been raised in *Johnstone v Milling* (1886) 16 QBD 460, CA (landlord's declaration of inability to fulfil covenant to rebuild; breach not empowering tenant to terminate the lease). The American authorities are against such a right of action: see the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 250; *JW Ellison, Son & Co v Flat Top Grocery Co* 69 W Va 380, 71SE 391 (USA 1911); and this seems the better view.

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## **D. RIGHTS OF INNOCENT PARTY**

### **1002. Rights of innocent party in case of serious breach: in general.**

A distinction must be drawn according to whether or not performance of any promise was due before the serious breach occurred; since in no case does breach of contract terminate that contract *ab initio*<sup>1</sup>. Rights which have already accrued before the serious breach remain unaffected<sup>2</sup>. Thus the innocent party (B) remains entitled to damages in respect of prior breaches by A<sup>3</sup>, and may recover in restitution any money he has paid A where there has been a total failure of consideration<sup>4</sup>, or as regards any benefit conferred<sup>5</sup>. At common law, A will be able to recover damages in respect of any prior breach by B, though he will not be able to recover any forfeitable deposit<sup>6</sup> unless there has been a total failure of consideration<sup>7</sup>; but equity may grant some relief against forfeiture<sup>8</sup>.

Except where there is a frustrating breach which renders further performance of the contract impossible<sup>9</sup>, or possibly at common law where there was a repudiation of a contract of employment<sup>10</sup>, a serious breach of contract by A<sup>11</sup> will not of itself have the effect of discharging the contract *de futuro*. Rather, a serious breach by A has the effect of giving the innocent party (B) a *prima facie* right to elect<sup>12</sup> whether he will treat the contract as at an end or as still on foot as regards future obligations in it<sup>13</sup>. This is sometimes conveniently, but inaccurately, described as 'rescission'<sup>14</sup>. The contract does not come to an end and therefore, in assessing damages, the court will have to have regard to its terms<sup>15</sup>, including those obligations due to be performed subsequently<sup>16</sup> and any exclusion clause<sup>17</sup> or liquidated damages clause<sup>18</sup>. Valid restrictive covenants in employment contracts therefore continue in force<sup>19</sup>, and disputes arising from the contract continue to be governed by any arbitration clause<sup>20</sup>.

Before B makes his election, A may tender performance of the contract according to its terms<sup>21</sup>. B, if he does not wish to bring the contract to an end, then has a choice: he may waive the breach altogether by accepting A's performance<sup>22</sup>; or waive the right to rescind<sup>23</sup> by affirming the contract<sup>24</sup> and claiming damages<sup>25</sup>. If B affirms the contract it remains in existence for the benefit of both parties, though the innocent party's right to claim damages for the breach is not affected<sup>26</sup> and he can retain any forfeitable deposit<sup>27</sup>. The innocent party must either affirm the whole contract or rescind the whole contract; he cannot approbate and reprobate by affirming part of it and disaffirming the rest<sup>28</sup>.

There is considered later the effect of B's electing to rescind<sup>29</sup>; his election at the time of rescission<sup>30</sup>, in the case of anticipatory breach<sup>31</sup>; rescission for inadequate reason<sup>32</sup>; what amounts to such an election<sup>33</sup>; breach by both parties<sup>34</sup>; and when B loses his *prima facie* right to rescind<sup>35</sup>.

1 Rescission of the contract for breach is only *de futuro*, not *ab initio*: see para 986 ante.

2 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477, Aust HC; *Johnson v Agnew* [1980] AC 367 at 396, [1979] 1 All ER 883 at 892, HL; *Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475 at 487, [1985] 1 WLR 435 at 450, CA.

3 Such as a broken promise to pay a deposit: *Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475, [1985] 1 WLR 435, CA.

4 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Coombe Barbour Ltd*[1943] AC 32 at 52, 65, [1942] 2 All ER 122 at 131, 138, HL; *Kwei Tek Chao v British Traders and Shippers Ltd*[1954] 2 QB 459 at 475, [1954] 1 All ER 779 at 787.

5 B may be able to recover quantum meruit or quantum valebat for goods handed over or services rendered: see para 618 ante; *RESTITUTION* vol 40(1) (2007 Reissue) para 113 et seq.

6 *Fitt v Cassanet* (1842) 4 Man & G 898. However, he may be able to recover a part-payment: *Dies v British and International Mining and Finance Corp Ltd*[1939] 1 KB 724.

7 *Stocznia Gdanska SA v Latvian Shipping Co*[1998] 1 All ER 883, [1998] 1 WLR 574, HL.

8 *Stockloser v Johnson*[1954] 1 QB 476, [1954] 1 All ER 630, CA.

9 *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*[1970] 1 QB 447, [1970] 1 All ER 225, CA; *Eastman Chemical International AG v NMT Trading Ltd and Eagle Transport Ltd* [1972] 2 Lloyd's Rep 25. Although on the facts of *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* supra further performance of the contract was literally impossible, the statements therein suggest that the contract is brought to an end whenever the effect of the breach is equivalent to frustration; but cf the effect of 'self-induced frustration': see para 899 ante.

10 It has been suggested that repudiation of a contract of employment at common law automatically brings the contract to an end: *Vine v National Dock Labour Board*[1956] 1 QB 658 at 674, [1956] 1 All ER 1 at 8, CA, per Jenkins LJ (affd [1957] AC 488 at 500, [1956] 3 All ER 939 at 944, HL); *Sanders v Ernest A Neale Ltd*[1974] 3 All ER 327, [1974] ICR 565; *Hare v Murphy Bros Ltd*[1974] 3 All ER 940, [1974] ICR 603, CA. But see *Decro-Wall International SA v Practitioners in Marketing Ltd*[1971] 2 All ER 216, [1971] 1 WLR 361, CA; *Thomas Marshall (Exports) Ltd v Guinle*[1979] Ch 227, [1978] 3 All ER 193; *Gunton v Richmond-upon-Thames London Borough Council*[1981] Ch 448, [1980] 3 All ER 577, CA; *FC Shepherd & Co Ltd v Jerrom*[1987] QB 301, [1986] ICR 802, CA; *Rigby v Ferodo Ltd* [1988] ICR 29, [1987] IRLR 516, HL; and see *EMPLOYMENT*.

11 Is a breach constituting a failure of a condition precedent (see paras 962 et seq, 991 ante), failure of consideration (see para 992 ante), breach of condition (see paras 993-994 ante), breach going to the root of the contract (see para 995 ante), fundamental breach (see para 996 ante) or repudiation (see para 997 et seq ante).

12 This is subject to the terms of the contract: see *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* [1998] 3 CL 118. As to the right to elect see paras 1004-1006 post; and as to election see para 1008 post.

13 'An unaccepted repudiation is a thing writ in water': *Howard v Pickford Tool Co Ltd*[1951] 1 KB 417 at 421, CA, per Asquith LJ; *Frost v Knight*(1872) LR 7 Exch 111, Ex Ch; *Brown v Muller*(1872) LR 7 Exch 319; *Roper v Johnson*(1873) LR 8 CP 167; *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co*(1884) 9 App Cas 434, HL; *Johnstone v Milling*(1886) 16 QBD 460 at 467, CA, per Lord Esher MR, and at 470-471 per Cotton LJ, and at 472, 473 per Bowen LJ; *Braithwaite v Foreign Hardwood Co*[1905] 2 KB 543 at 548, 549, CA, per Collins MR; *Anchor Line (Henderson Bros) Ltd v Mohad*[1922] 1 AC 146, HL; *White and Carter (Councils) Ltd v McGregor*[1962] AC 413, [1961] 3 All ER 1178, HL (overruling *Langford & Co v Dutch*1952 SC 15); *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*[1970] 1 QB 447 at 464, [1970] 1 All ER 225 at 233, CA, per Lord Denning MR; *Decro-Wall International SA v Practitioners in Marketing Ltd*[1971] 2 All ER 216, [1972] 1 WLR 361, CA; *Bunge Corp v Vegetable Vitamin Foods (Private) Ltd* [1985] 1 Lloyd's Rep 613; *Beitel v Sorokin* [1973] 5 WWR 639, Alb SC; and see the cases cited in para 1006 post.

14 See eg *Berger & Co Inc v Gill & Duffus SA*[1984] AC 382 at 389-391, sub nom *Gill & Duffus SA v Berger & Co Inc*[1984] 1 All ER 438 at 442-443, HL, per Lord Diplock; and para 1003 post. 'Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect': *Heyman v Darwins Ltd*[1942] AC 356 at 399, [1942] 1 All ER 337 at 360, HL, per Lord Porter; approved *Johnson v Agnew*[1980] AC 367, [1979] 1 All ER 883, HL. Other convenient, but inaccurate, expressions used by the courts include that a contract in these circumstances is 'discharged' or 'terminated'.

15 *Heyman v Darwins Ltd*[1942] AC 356 at 373, [1942] 1 All ER 337 at 346-347, HL; *FJ Bloemen Pty Ltd v Council of the City of Gold Coast*[1973] AC 115, [1972] 3 All ER 357, PC. As to the exercise of a cancellation clause on breach see *Fercometal SARL v Mediterranean Shipping Co SA, The Simona*[1989] AC 788, [1988] 2 All ER 742, HL; *Global of London (Tours and Travel) v Tait* 1977 SLT 96; and para 994 note 10 ante.

16 *O'Neil v Armstrong, Mitchell & Co*[1895] 2 QB 418, CA; *Moschi v Lep Air Services Ltd*[1973] AC 331, [1972] 2 All ER 393, HL; *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos*[1971] 1 QB 164, [1970] 3 All ER 125, CA.

17 *Photo Production Ltd v Securicor Transport Ltd*[1980] AC 827, [1980] 1 All ER 556, HL.

18 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[1967] 1 AC 361, [1966] 2 All ER 61, HL.

19 *Thomas Marshall (Exports) Ltd v Guinle*[1979] Ch 227, [1978] 3 All ER 193. As to restraint of trade see para 866 ante.

20 *Heyman v Darwins Ltd*[1942] AC 356, [1942] 1 All ER 337, HL; *FJ Bloemen Pty Ltd v Council of the City of Gold Coast*[1973] AC 115, [1972] 3 All ER 357, PC.

21 *Borrowman Phillips & Co v Free & Hollis*(1878) 4 QBD 500, CA; contra where it is no longer possible to cure the breach: *Union Eagle Ltd v Golden Achievement Ltd*[1997] AC 514, [1997] 2 All ER 215, PC (purchaser of land tendered price ten minutes late).

22 See para 1027 post.

23 *Aquis Estates Ltd v Minton*[1975] 3 All ER 1043, [1975] 1 WLR 1452, CA; *Buckland v Farmer & Moody*[1978] 3 All ER 929, sub nom *Buckland v Farmer & Moody* [1979] 1 WLR 221, CA; and see para 983 note 8 ante.

24 As to affirmation see paras 1010-1011 post. A party who does not immediately exercise his right to rescind may only be granting a forbearance: see para 1025 post. An election is final (*Hain Steamship Co Ltd v Tate and Lyle Ltd*[1936] 2 All ER 597 at 601, 41 Com Cas 350 at 355, HL, per Lord Atkin) whereas the effect of a forbearance may be terminated.

25 *Reid v Hoskins, Avery v Bowden* (1856) 6 E & B 953 (anticipatory breach: see para 1005 post); later frustrating event (see para 902 ante). See further para 1010 post.

26 *Frost v Knight*(1872) LR 7 Exch 111 at 112, Ex Ch, per Cockburn CJ; and see further para 1005 post. But if the breach is anticipatory it will not, unless accepted as a repudiation, give rise to a right to damages until the date fixed for performance. If the remedy sought after an unaccepted repudiation is specific performance the court will make the decree although the date fixed for completion has not arrived, but its operation will be postponed until the completion date: *Hasham v Zenab*[1960] AC 316, PC; cf *MacNaughton v Stone* [1949] OR 853, [1950] 1 DLR 330, Ont (innocent party electing to accept repudiation; no right to specific performance).

27 *Union Eagle Ltd v Golden Achievement Ltd*[1997] AC 514, [1997] 2 All ER 215, PC.

28 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[1967] 1 AC 361 at 398, [1966] 2 All ER 61 at 71, HL, per Lord Reid; *West v National Motor and Accident Insurance Union Ltd*[1955] 1 All ER 800, [1955] 1 WLR 343, CA.

29 See para 1003 post.

30 See para 1004 post.

31 See paras 1005-1006 post.

32 See para 1007 post.

33 See para 1008 post.

34 See para 1009 post.

35 See paras 1010-1011 post.

## UPDATE

### 1002 Rights of innocent party in case of serious breach: in general

NOTE 10--See also *White v Bristol Rugby Ltd*[2002] IRLR 204 (contract of employment not automatically brought to an end where employee refused to serve employer).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/ (4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT/(ii) Rescission for Breach of Contract/D. RIGHTS OF INNOCENT PARTY/1003. Rights of innocent party in case of serious breach: effect of rescission de futuro.

**1003. Rights of innocent party in case of serious breach: effect of rescission de futuro.**

If the innocent party (B) can and does elect to rescind the contract de futuro following a breach by the other party (A)<sup>1</sup>, all the primary obligations of the parties under the contract which have not yet been performed are terminated<sup>2</sup>. This termination does not prejudice the rights of the party so electing to claim damages (B) from the party in repudiatory breach (A) for any loss sustained in consequence of the non-performance by A of his primary obligations under the contract, future as well as past. Nor does the termination deprive the party in repudiatory breach (A) of the right to claim, or to set off, damages for any past non-performance by the other party (B) of that other party's own primary obligations, due to be performed before the contract was rescinded. Thus the innocent party (B) is released from further liability to perform<sup>3</sup>; and, for the 'primary' obligation of the defaulting party to perform<sup>4</sup>, there is substituted by operation of law a 'secondary' obligation to pay damages for the loss resulting from failure to perform the primary obligation<sup>5</sup>. However, prior liabilities remain: where a creditor accepts his debtor's default as terminating the contract, this does not release a guarantor<sup>6</sup> who remains liable for moneys payable by the debtor after the date of discharge<sup>7</sup>. Neither does the termination affect unpaid sums due before that time<sup>8</sup>. Similarly, a partner may remain liable in respect of prior partnership obligations<sup>9</sup>.

A lease, though involving a contract, is not brought to an end merely by acceptance of the repudiation<sup>10</sup>; but a mere contractual licence is so terminated<sup>11</sup>.

1 See para 1002 ante.

2 *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382 at 384, sub nom *Gill & Duffus SA v Berger & Co Inc* [1984] 1 All ER 438 at 442-443, HL, per Lord Diplock (buyer of goods wrongfully rejecting shipping documents); and see para 1005 note 5 post.

3 A party who rescinds for defective performance may have to pay nothing for the partial performance (see para 921 ante); but if he voluntarily accepts a benefit conferred on him by the partial performance he will have to pay for that (see para 923 ante). See also *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All ER 597, 41 Com Cas 350, HL; and CARRIAGE AND CARRIERS.

4 A provision for the submission of disputes to arbitration, which commonly survives the discharge of the contract for breach or frustration, is properly to be regarded as an instance of a primary obligation under the contract continuing despite the discharge of the contract: see *Moschi v Lep Air Services Ltd* [1973] AC 331 at 350, [1972] 2 All ER 393 at 403, HL, per Lord Diplock; and see further *Heyman v Darwins Ltd* [1942] AC 356, [1942] 1 All ER 337, HL; and ARBITRATION vol 2 (2008) PARA 1215.

5 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345-346, [1972] 2 All ER 393 at 399, HL, per Lord Reid, at 350 and at 402-403 per Lord Diplock, at 353 and at 407 per Lord Simon; and see *FJ Bloemen Pty Ltd v Council of the City of Gold Coast* [1973] AC 115, [1972] 3 All ER 357, PC (accepted repudiation; contractual provision for payment of interest terminated); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL.

6 Unless those sums were not recoverable from the debtor: *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207. As to guarantee see generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

7 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

8 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129, HL; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 575, HL. See also paras 772, 942, 990 ante, 1008, 1012 post.

9 *Hurst v Bryk* [1997] 2 All ER 283, [1998] 2 WLR 268, CA.

10 *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318, [1971] 3 All ER 1226, CA; *Hurst v Bryk* [1997] 2 All ER 283, [1998] 2 WLR 268, CA; cf *Moore v Ullcoats Mining Co Ltd* [1908] 1 Ch 575; and see further LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 601. See also *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL; and para 900 ante.

11 *Ivory v Palmer* [1975] ICR 340, 119 Sol Jo 405, CA.

## **UPDATE**

### **1003 Rights of innocent party in case of serious breach: effect of rescission de futuro**

NOTES 9, 10--*Hurst v Bryk*, cited, affirmed: [2000] 2 WLR 740, HL.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/ (4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT/(ii) Rescission for Breach of Contract/D. RIGHTS OF INNOCENT PARTY/1004. Right to elect in cases of breach or repudiation at time for performance.

#### **1004. Right to elect in cases of breach or repudiation at time for performance.**

Despite the principle that a breach by A giving rise to a right to rescind does not of itself usually terminate the contract automatically<sup>1</sup>, if such a breach is committed when the time for performance has arrived the innocent party (B) will in many cases for practical purposes have to accept the breach and treat the contract as discharged because B is under a duty to mitigate his damage<sup>2</sup>. However, this duty is not a high one and B is not required to do anything outside the ordinary course of business<sup>3</sup>, which would often include making efforts to get the defaulting party to perform his part of the contract. Moreover, if B acts reasonably to mitigate damage, he may recover all loss and expense he may have incurred even though he may, in fact, have aggravated the damage<sup>4</sup>.

There are instances where the duty to mitigate the damage does not arise. Where the contract is one in respect of which specific performance<sup>5</sup> or an injunction<sup>6</sup> is available the innocent party may affirm the contract and seek that remedy without fear of the rules as to mitigation. Similarly, where the innocent party has fully performed, or can fully perform, his side of the contract notwithstanding the breach he may do so and recover the contract sum or price for his performance, for he is then claiming a debt and the rules of mitigation do not apply to claims for debt<sup>7</sup>.

1 See para 1002 ante.

2 See eg the Sale of Goods Act 1979 s 51(3) (measure of damages for non-delivery where available market) assumes that the buyer will mitigate his loss by going into the market (see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 294, 360); *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448, [1980] 3 All ER 577, CA (employment contract); *Telephone Rentals v Burgess Salmon* [1987] CCLR 419, [1987] CLY 450, CA (A made it impossible for B to continue to perform his side of the contract). See also note 7 infra. As to mitigation of damages see *Payzu Ltd v Saunders* [1919] 2 KB 581, CA; and DAMAGES.

3 See *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509; and DAMAGES.

4 *Hoffberger v Ascot International Bloodstock Bureau Ltd* (1976) 120 Sol Jo 130, CA.

5 Eg a contract for the sale of land: see *Sunbird Plaza Pty Ltd v Maloney* (1988) 77 ALR 205, Aust HC; and SPECIFIC PERFORMANCE.

6 See *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193; and CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

7 This is clearly implied in *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL, though the breach there was anticipatory. For a possible limitation on this principle see para 1006 post.

Another case in which the innocent party may have an effective right to elect between rescission and affirmation is delivery of defective goods, for the measure of damages may differ according to the course he takes: see the Sale of Goods Act 1979 ss 51(3), 53(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 294, 309, 360.

#### **UPDATE**

#### **1004 Right to elect in cases of breach or repudiation at time for performance**



NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/ (4) DISCHARGE BY RESCISSION FOR BREACH OF CONTRACT/(ii) Rescission for Breach of Contract/D. RIGHTS OF INNOCENT PARTY/1005. Right to elect in cases of anticipatory breach.

### **1005. Right to elect in cases of anticipatory breach.**

Where the contract is repudiated by A before the time for performance<sup>1</sup>, the innocent party (B) has two alternatives: he may choose to accept the breach, or he may choose not to do so<sup>2</sup>.

B may, if he thinks fit, treat the repudiation as a wrongful attempt to put an end to the contract and may at once treat himself as discharged, in which case the contract is immediately rescinded<sup>3</sup>. Thereafter, it is not open to A to tender performance at the time originally fixed<sup>4</sup>; and B is relieved from proving that he is then willing and able to perform his side of the contract<sup>5</sup>. It is therefore no defence for A to show that, if he had not renounced the contract, B would have been unable to perform at the appointed time<sup>6</sup> (though this may be material to the assessment of damages<sup>7</sup>). Thereupon, B may immediately bring an action for damages<sup>8</sup> for the breach<sup>9</sup>, even though his right to damages is then only contingent<sup>10</sup>. He will generally be entitled to such damages as would have arisen from the non-performance of the contract at the appropriate time for performance<sup>11</sup>. Those damages, however, may be subject to abatement where (1) there are circumstances which may afford B a means of mitigating his loss<sup>12</sup>; (2) the true amount of B's loss would have been reduced but for his own inability to perform a part of his contractual obligations<sup>13</sup>.

Alternatively, B may treat the anticipatory repudiation as inoperative and await the time when the contract is to be performed, and then hold the other party (A) responsible for the consequences of non-performance<sup>14</sup>. However, in such a case B keeps the contract alive for the benefit of A as well as himself: B remains subject to all his own obligations and liabilities under it<sup>15</sup>, and he enables A not only to complete the contract (notwithstanding his previous repudiation of it<sup>16</sup>), but also to take advantage of any supervening circumstances which would justify him in declining to complete it<sup>17</sup>.

1 See para 1001 ante.

2 *Norwest Holst Group Administration Ltd v Harrison* [1985] ICR 668, sub nom *Harrison v Norwest Holst Group Administration* [1985] IRLR 240, CA (employee did not unequivocally accept repudiation until after it had been withdrawn); *Vitol SA v Norelf Ltd, The Santa Clara* [1996] AC 800, [1996] 3 All ER 193, HL (buyer's repudiation; seller's election to rescind inferred from inaction). As to election see paras 1006, 1008 post.

3 *Johnstone v Milling* (1886) 16 QBD 460 at 467, CA, per Lord Esher MR.

4 *Danube and Black Sea Rly and Kustenjie Harbour Co Ltd v Xenos* (1863) 13 CBNS 825, Ex Ch.

5 *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 KB 543 at 551, 554, CA; *British and Beningtons Ltd v North Western Cachar Tea Co* [1923] AC 48 at 66, HL; *Rightside Property Ltd v Gray* [1975] Ch 72 at 82, [1974] 2 All ER 1169 at 1178; *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382, sub nom *Gill & Duffus SA v Berger & Co Inc* [1984] 1 All ER 438, HL (cif sale; buyer wrongfully rejected documents; held: buyer wrongfully repudiated, notwithstanding goods in breach of contract).

6 *Sinason-Teicher Inter-American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd* [1954] 2 All ER 497, [1954] 1 WLR 935; affd [1954] 3 All ER 468, [1954] 1 WLR 1394, CA.

7 *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 183, [1970] 3 All ER 125, at 142, CA; *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382 at 392, 396-397, sub nom *Gill & Duffus SA v Berger & Co Inc* [1984] 1 All ER 438, at 444, 447-448, HL, per Lord Diplock.

8 As to damages for breach of contract see generally para 1012 post; and DAMAGES.

9 *Hochster v De la Tour* (1853) 2 E & B 678; *Danube and Black Sea Rly and Kustenjie Harbour Co Ltd v Xenos* (1863) 13 CBNS 825, Ex Ch; *Frost v Knight* (1872) LR 7 Exch 111, Ex Ch; *Rhymney Rly v Brecon and Merthyr Tydfil Junction Rly* (1900) 69 LJ Ch 813, CA; *Michael v Hart & Co* [1902] 1 KB 482, CA; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* [1909] AC 293, PC; *Farshind etc v Bechely-Crundall* 1922 SC 173, HL; *British and Beningtons Ltd v North Western Cachar Tea Co* [1923] AC 48, HL; *Never-Stop Rly (Wembley) v British Empire Exhibition (1924) Inc* [1926] Ch 877; *Guy-Pell v Foster* [1930] 2 Ch 169, CA; *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70 (affd [1957] 3 All ER 234, [1957] 1 WLR 979, CA); *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL; *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 183, [1970] 3 All ER 125, CA.

10 *Frost v Knight* (1872) LR 7 Exch 111, Ex Ch; *Synge v Synge* [1894] 1 QB 466, CA.

11 *Frost v Knight* (1872) LR 7 Exch 111, Ex Ch; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 356, [1972] 2 All ER 393 at 408, HL; and see the cases cited in note 9 supra.

12 *Roper v Johnson* (1873) LR 8 CP 167; *Melachrino v Nickoll and Knight* [1920] 1 KB 693. For the assessment of damages in such cases see generally *L Roth & Co Ltd v Taysen, Townsend & Co* (1896) 12 TLR 211, CA; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] AC 1130n, [1967] 2 All ER 353, HL; and *Evans Marshall & Co Ltd v Bertola SA and Independent Sherry Importers Ltd*, [1976] 2 Lloyd's Rep 17, HL; and see DAMAGES.

As to the relevance of the duty to mitigate in cases where the innocent party does not rescind see paras 1004 ante, 1006 post.

13 *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, [1970] 1 All ER 673, revsd on other grounds on appeal [1971] 1 QB 183, [1970] 3 All ER 125, CA (charterparty; repudiation by charterers; owners' inability to get to port of loading on time); and see *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227, HL; *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382, sub nom *Gill & Duffus SA v Berger & Co Inc* [1984] 1 All ER 438, HL.

14 *Frost v Knight* (1872) LR 7 Exch 111, Ex Ch, obiter; and see the cases cited in note 9 supra, particularly *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL; *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382, sub nom *Gill & Duffus SA v Berger & Co Inc* [1984] 1 All ER 438, HL.

15 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL. See further para 1010 post.

16 *Frost v Knight* (1872) LR 7 Exch 111, Ex Ch; *Johnstone v Milling* (1886) 16 QBD 460 at 470, CA, per Cotton LJ; *RV Ward Ltd v Bignall* [1967] 1 QB 534 at 548, [1967] 2 All ER 449, CA, obiter per Diplock LJ.

17 *Reid v Hoskins, Avery v Bowden* (1856) 6 E & B 953, Ex Ch (charterer repudiated contract; shipowner refused to accept repudiation; outbreak of war before time for performance rendered contract illegal (see para 847 ante), which frustrated it (see para 902 note 17 ante)).

Where, prior to the date of loading under a voyage charterparty, the charterer (A) wrongly purported to cancel the charter, but the owner (B) did not accept the repudiation, it was held that A was entitled to cancel under the terms of the charterparty when B was not ready to load on due date: *Fercometal SARL v Mediterranean Shipping Co SA, The Simona* [1989] AC 788, [1988] 2 All ER 742, HL. See also *Seagap Garages Ltd v Gulf Oil (Great Britain) Ltd* (1988) Times, 24 October, CA.

## UPDATE

### 1005 Right to elect in cases of anticipatory breach

NOTE 7--See *Chiemgauer Membran Und Zeltbau GmbH v New Millennium Experience Co Ltd* [2000] All ER (D) 2313 (claimant filed for bankruptcy after accepting defendant's repudiatory breach; entitlement to damages not affected and assumption to be made that claimant would have been able to perform the contract).

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### **1006. Election and mitigation in cases of anticipatory breach.**

Where, in a case of anticipatory breach, the innocent party (B) elects to rescind the contract, he is required to mitigate his damage<sup>1</sup>. However, the rules of mitigation cannot control the way in which B elects, so that, unless and until he elects to rescind, B will generally be under no duty to mitigate<sup>2</sup>; and there can in any event be no duty on B to mitigate his loss until the due date for performance<sup>3</sup>. Furthermore, the duty to mitigate has no application to claims for debt<sup>4</sup>, so that, if A can fully perform his side of the agreement, he may do so and sue for the agreed sum rather than damages<sup>5</sup>.

However, there are a number of limitations to the rule that B may recover an agreed sum free from the duty to mitigate. First, wherever B is unable fully to perform without the co-operation of A<sup>6</sup>, it seems that B will be reduced to claiming damages and hence will be required to mitigate his loss<sup>7</sup>, so that a wrongfully dismissed employee can normally sue only for damages and not for his wages or salary<sup>8</sup>. Secondly, if it can be shown in such a case that B has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, it may be that B will not be allowed to saddle the defaulting party (A) with an additional burden with no benefit to himself<sup>9</sup>. Thirdly, it has been said that the rule against mitigation should only be followed where precedent so requires<sup>10</sup>.

1 See para 1004 ante.

2 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL (see note 5 infra); *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 TLR 716, CA (anticipatory repudiation by buyers of contract for sale of coal at 16s a ton; buyers found another buyer at 16 shillings and threepence a ton; sellers refused to accept this alternative and sold coal after the date of delivery at 15 shillings a ton; sellers entitled to one shilling a ton damages). For the assessment of damages generally in cases of unaccepted repudiation see *Leigh v Paterson* (1818) 8 Taunt 540; *Phillpotts v Evans* (1839) 5 M & W 475; and DAMAGES; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 287 et seq.

3 *Brown v Muller* (1872) LR 7 Exch 319; *Roper v Johnson* (1873) LR 8 CP 167; *Melachrino v Nickoll and Knight* [1920] 1 KB 693.

4 As to actions for debt see generally para 942 ante.

5 See *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL, where advertising contractor (B) agreed with A to advertise A's garage on public sites for a three year period for a fixed fee; A wrongfully cancelled the contract before the time it was due to commence; and B successfully sued for the agreed fee. See also *Anglo-African Shipping Co of New York Inc v J Mortner Ltd* [1962] 1 Lloyd's Rep 81; affd on other grounds [1962] 1 Lloyd's Rep 610, CA (plaintiffs acting as confirming house personally contracted to buy goods for delivery to defendants; defendants repudiated; plaintiffs shipped goods to defendants and recovered price, expenses and commission). The rule is otherwise in the USA and a party receiving a repudiation may not go on to perform and recover the agreed sum: see Corbin, *Contract* (1963) para 983; *Western Advertising Co v Mid-West Laundries* 61 SW 2d 251 (Missouri 1933).

As to the circumstances in which a seller of goods may claim the price rather than damages see the Sale of Goods Act 1979 s 49; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 28, 285 et seq, 379.

For examples of situations where the plaintiff cannot fully perform his side of the bargain without the co-operation of the other party see the cases cited in notes 7-8 infra; and see *Frost v Knight* (1872) LR 7 Exch 111, Ex Ch; *Finelli v Dee* [1968] 1 OR 676, 67 DLR (2d) 393, Ont CA.

6 Cf note 2 supra.

7 Cf note 5 supra. In *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326, the contract was to do works on land. Megarry J considered that the principle of *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL, was inapplicable because the contract required active co-operation on the part of the site owners. Quære whether the principle has any application where the party repudiating is owner of property on which the innocent party is to work under the contract: *Hounslow London Borough Council v Twickenham Garden Developments Ltd* supra at 254 and at 342.

8 *Goodman v Pocock* (1850) 15 QB 576; *Hochster v De la Tour* (1853) 2 E & B 678; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699, [1968] 3 All ER 513, CA; and see EMPLOYMENT; cf *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 223, [1971] 1 WLR 361 at 370, CA, per Salmon LJ, and at 228 and 376 per Sachs LJ, and at 233 and 381 per Buckley LJ. It is probably still the case that a repudiation of a contract of service by the employer which is not accepted by the employee does not itself terminate that contract, but in most cases the practical effect of the repudiation is much the same as if it had so terminated the contract: *Hill v CA Parsons & Co Ltd* [1972] Ch 305, [1971] 3 All ER 1345, CA; and para 1002 note 10 ante.

9 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 at 431, [1961] 3 All ER 1178 at 1183, HL, per Lord Reid; cf Lord Hodson (Lord Tucker concurring) [1962] AC 413 at 445, [1961] 3 All ER 1118 at 1193.

10 With reference to *White & Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL, Lord Denning said: 'The decision is one which I should be slow to apply to any category of case not firmly within the contemplation of their Lordships': *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 253, [1970] 3 All ER 326 at 342. See also *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, CA (demise charter required charterer to carry out all repairs; held: this clause would not be enforced as it was tantamount to ordering specific performance); *Clea Shipping Corp v Bulk Oil International Ltd, The Alaskan Trader* [1984] 1 All ER 129, [1983] 2 Lloyd's Rep 645 (owner, after the charterer's repudiation, kept ship and full crew on standby; held only entitled to damages rather than the agreed hire).

## UPDATE

### 1006 Election and mitigation in cases of anticipatory breach

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--See also *Reichman v Beveridge* [2006] EWCA Civ 1659, [2007] Bus LR 412 (landlord refused to accept tenant's repudiation of lease; tenant liable for arrears of rent accruing after its vacation of the premises).

NOTE 6--See *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch), [2003] 2 All ER (Comm) 823.

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### 1007. Rescission for inadequate reason.

The fact that a contracting party (B) purports to rely upon an inadequate reason, or no reason at all, for rescinding a contract will normally amount to a repudiation by him<sup>1</sup>; but this rule does not apply where he later relies upon another, and adequate, reason<sup>2</sup>. For instance, where an employee alleges wrongful dismissal, at common law the employer can justify the dismissal by relying on information acquired after dismissal<sup>3</sup>.

The exception is, however, subject to the qualification that B may by his conduct preclude himself from setting up the adequate reason<sup>4</sup>; this may be based upon a principle of estoppel by conduct<sup>5</sup> or upon a separate doctrine in the nature of a requirement of fair conduct<sup>6</sup>. Further, it may be that B may be unable to rely on a valid reason if the point which was not taken could have been put right<sup>7</sup>.

1 *Fercometal SARL v Mediterranean Shipping Co SA, The Simona* [1989] AC 788, [1988] 2 All ER 742, HL.

2 *British and Beningtons Ltd v North Western Cachar Tea Co* [1923] AC 48 at 71, HL, per Lord Sumner; *State Trading Corp of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277, CA; *Sheffield v Conran* (1987) 22 ConLR 108, CA. See also *Ridgway v Hungerford Market Co* (1835) 3 Ad & El 171 at 177, 178, 180; *Baillie v Kell* (1838) 4 Bing NC 638; *Taylor v Oakes, Roncoroni & Co* (1922) 127 LT 267 at 269; *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401, [1957] 2 All ER 70 (affd [1957] 3 All ER 234, [1957] 1 WLR 979, CA); *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 at 56, CA, per Lord Denning MR; *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 195, 196, [1970] 3 All ER 125 at 128, CA, per Lord Denning MR; *Albion Sugar Co v William Tankers and Davies, The John S Darbyshire* [1977] 2 Lloyd's Rep 457; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514, CA; cf *James Shaffer Ltd v Findlay Durham and Brodie* [1953] 1 WLR 106 at 121, CA, per Singleton LJ.

3 *Ridgway v Hungerford Market Co* (1835) 3 Ad & El 171 at 177-178, 180; *Baillie v Kell* (1838) 4 Bing NC 638; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA; *Cyril Leonard & Co v Simo Securities Trust* [1971] 3 All ER 1313, [1972] 1 WLR 80, CA. The rule does not apply to unfair dismissal: see *W Devis & Sons Ltd v Atkins* [1977] AC 931, [1977] 3 All ER 40, HL; and EMPLOYMENT vol 40 (2009) PARAS 702, 727.

4 *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53, CA (goods delivered with incorrectly dated bill of lading; buyers refused to take delivery on ground of non-compliance with description; later, on appeal to trade association, buyers purported to rely on falsely dated bill of lading in order to reject); and see *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459, [1954] 1 All ER 779; *Alfred C Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep 118, CA.

5 *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 at 57, CA, per Lord Denning MR; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514 at 527, CA per Evans LJ. As to waiver and estoppel see further paras 1025, 1030 post.

6 *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 at 59, CA, per Winn LJ; but see *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514 at 529-530, CA. As to good faith dealings see para 613 ante.

7 *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770 at 773, [1954] 1 WLR 1273 at 1278, CA per Lord Somervell; *André et Cie v Cook Industries Inc* [1987] 2 Lloyd's Rep 463 at 468-469, CA; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514 at 526, CA per Evans LJ.

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### 1008. Election to rescind.

The question whether or not an innocent party (B) has elected to rescind is one of fact<sup>1</sup>. An election to rescind must involve an unequivocal assertion by B that he regards himself as no longer bound by the contract as a result of the breach<sup>2</sup>; and it has been said that a mere intimation of acceptance of a repudiation, if followed by no further action on the part of the innocent party, does not rescind the contract<sup>3</sup>. Mere inactivity or acquiescence by B is not necessarily<sup>4</sup> sufficient<sup>5</sup>. The issue, without service, of a writ claiming damages for breach of contract probably does not constitute an election to rescind, even if it purports to treat the contract as determined<sup>6</sup>. An effective election cannot be made by B unless he is aware of his rights of election and rescission<sup>7</sup>. Moreover, it seems that even an effective election in the course of proceedings may be set aside on appeal<sup>8</sup>.

Where the defaulting party (A) is the plaintiff in an action and the innocent party (B) is merely relying upon the breach as justification for his non-performance<sup>9</sup>, B need show no positive acceptance of the breach as terminating the contract<sup>10</sup>, though he will not be able to rely upon that breach as discharging him if his inaction is such as otherwise to constitute affirmation<sup>11</sup>.

Prima facie, an election by B to rescind must be communicated to A<sup>12</sup>, but where A deliberately puts it out of B's power to make such communication, B may exercise his right to rescind by any act falling short of communication which evinces an unequivocal intention to rescind<sup>13</sup>. From this must be distinguished an agreement to abandon the contract<sup>14</sup>.

1 *Kish v Taylor* [1912] AC 604 at 617, HL, per Lord Atkinson.

2 See *Johnstone v Milling* (1886) 16 QBD 460, CA (tenant could not at same time terminate tenancy by notice and sue for damages as on acceptance of anticipatory breach); *The Munster* [1983] 1 Lloyd's Rep 370, CA; *Berger & Co Inc v Gill & Duffus SA* [1984] AC 382, sub nom *Gill & Duffus SA v Berger & Co Inc* [1984] 1 All ER 438, HL; *Norwest Holt Group Administration v Harrison* [1985] ICR 668, CA; *Holland v Wiltshire* (1954) 90 CLR 409, Aust HC; cf *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318, [1971] 3 All ER 1226, CA.

3 *Société Générale de Paris v Milders* (1883) 49 LT 55.

4 *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 at 732, [1968] 3 All ER 513 at 527-528, CA; *State Trading Corp of India Ltd v M Goloditz Ltd* [1989] 2 Lloyd's Rep 277 at 286, CA; *Lefevre v White* [1990] 1 Lloyd's Rep 569 at 574, 576.

5 But continuing failure to perform may be sufficiently unequivocal: *Vitol SA v Norelf Ltd, The Santa Clara* [1996] AC 800, [1996] 3 All ER 193, HL.

6 *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 at 556, [1964] 1 All ER 290 at 297, CA, obiter per Upjohn LJ; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1966] 1 QB 650 at 675, [1965] 3 All ER 273 at 280, CA, per Sellers LJ (affd without decision on this point [1968] AC 1130n, [1967] 2 All ER 353, HL); *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433, [1970] 2 All ER 795, CA.

However, a counter-claim may do so: *Tilcon Ltd v Land and Real Estate Investments Ltd* [1987] 1 All ER 615, [1987] 1 WLR 46, CA.

7 *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA; and see para 1010 notes 2-3 post.

8 *Stoczniá Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 575, HL (election to affirm in lower court removed by House of Lords when reversing the decision of the Court of Appeal).

9 See para 961 et seq ante.

10 *Tsakiroglou & Co Ltd v Transgrains SA* [1958] 1 Lloyd's Rep 562.

11 See para 1011 post.

12 *Scarfe v Jardine* (1882) 7 App Cas 345 at 361, HL, per Lord Blackburn; *Heyman v Darwins Ltd* [1942] AC 356 at 361, [1942] 1 All ER 337 at 340, HL, per Viscount Simon; *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164 at 204, [1970] 3 All ER 125 at 137-138, CA per Megaw LJ; *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 at 535, [1964] 1 All ER 290, CA (this case in fact concerned rescission for fraudulent misrepresentation); but cf this case at first instance at [1965] 1 QB 525 at 532, [1963] 2 All ER 547 at 550 per Lord Denning MR; see also the cases cited in note 6 supra.

There is some authority that an unequivocal act short of communication to A is sufficient even in the absence of A's fraud (see note 13 infra): *State Trading Corp'n of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286, CA; *Holland v Wiltshire* (1954) 90 CLR 409, Aust HC.

13 *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 at 535, [1964] 1 All ER 290, CA (report to police and Automobile Association that cheque for car had not been met). See also note 12 supra; and MISREPRESENTATION AND FRAUD; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 154.

14 *MSC Mediterranean Shipping Co SA v BRE Metro* [1985] 2 Lloyd's Rep 239 (plaintiff had not abandoned the contract, but accepted defendant's wrongful repudiation as bringing an end to it: see further para 1014 note 14 post).



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### **1009. Both parties in breach.**

Suppose both parties to a contract, A and B, each commit such breaches of that contract as would entitle the other to rescind<sup>1</sup>. Assuming it is not possible to determine from the conduct of the parties a subsequent agreement to abandon the contract<sup>2</sup>, a distinction should be drawn between where the breaches occur in series<sup>3</sup> and where they occur simultaneously<sup>4</sup>.

Where A's breach occurs before B's breach, the ordinary position is this: A's breach will give B a prima facie right to rescind<sup>5</sup>. If B elects to rescind, his subsequent failure to perform will not amount to a breach at all<sup>6</sup>. If B elects to affirm, the effect is to leave the contract standing for the benefit of both parties<sup>7</sup>, and B's subsequent failure to perform should therefore give A a prima facie right to rescind<sup>8</sup>.

Where the breaches of A and B are simultaneous, it has been said that each party is entitled to rescind on account of the other's breach<sup>9</sup>. However, where the two breaches are interrelated in the sense that both sides committed a repudiatory breach in delaying to apply to arbitration, the courts have held that neither party can rescind<sup>10</sup>. In the context of arbitration, these decisions have largely been rendered obsolete by statute<sup>11</sup> and it may be that the better view is now that both parties are entitled to rescind<sup>12</sup>.

1 See para 1002 ante.

2 See para 1014 post.

3 See the text and notes 6-8 infra.

4 See the text and notes 9-12 infra.

5 See para 1002 ante.

6 See para 1008 ante.

7 See paras 1002, 1005 ante.

8 'If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A's past breaches of contract, whatever their nature. A breach by A would only assist B if it was still continuing when A purported to treat B as having repudiated the contract and if the effect of A's subsisting breach was such as to preclude A from claiming that B had committed a repudiatory breach. In other words, B would have to show that A, being in breach of an obligation in the nature of a condition precedent, was therefore not entitled to rely on B's breach as a repudiation': *State Trading Corpn of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286, CA, per Kerr LJ.

9 See note 8 supra.

10 See *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909, [1981] 1 All ER 289, HL (held no abandonment; see also para 1014 note 14 post); *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854, [1983] 1 All ER 34, HL (see also paras 902 note 5 ante, 1014 note 16 post).

11 See the Arbitration Act 1996 s 41(3); and ARBITRATION vol 2 (2008) PARA 1250.

12 See Treitel *Law of Contract* (9th Edn) p 737.

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### **1010. Loss of right to rescind de futuro: affirmation.**

The prima facie right of the innocent party (B) to rescind for breach by A<sup>1</sup> will be lost if B affirms the contract knowing of A's breach<sup>2</sup> and of his right to rescind<sup>3</sup>. Affirmation must be unequivocal<sup>4</sup> and total<sup>5</sup>, but it may be express<sup>6</sup> or implied<sup>7</sup>. A plaintiff who remonstrated with the defendant but took no further action in respect of the breach was held not to have affirmed<sup>8</sup>. Once made, B's election to affirm is irrevocable<sup>9</sup> and there is no need to establish reliance on it by A<sup>10</sup>. However, the mere fact that B continued to press for performance will not normally preclude subsequent rescission<sup>11</sup>, nor will it do so in respect of subsequent breaches<sup>12</sup>.

By way of statutory exception, B may be deprived by his actions of his statutory right to rescind, notwithstanding his lack of knowledge of the breach. Thus in non-severable contracts for the sale of goods, prima facie the buyer loses the right to rescind the contract for breach<sup>13</sup> if he has accepted the goods or part of them<sup>14</sup>. The buyer is deemed to have accepted the goods: (1) when he intimates to the seller that he has accepted them<sup>15</sup>; or (2) when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller<sup>16</sup>; or (3) when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them<sup>17</sup>.

Where B elects to affirm the contract, it remains in existence for the benefit of both parties<sup>18</sup>; and the usual result is that B will have an action in contract for damages<sup>19</sup>. The question is whether after his breach A may raise by way of defence the fact that B is unable to perform his side of the bargain. If B has elected to rescind, A cannot do so<sup>20</sup>, but where B elects to affirm, in principle such a plea by A should be allowed. For some time, such a principle was denied<sup>21</sup>, but it has since been supported by the House of Lords<sup>22</sup>. However, where B affirms, the circumstances may be such that A is in any event estopped from setting up B's inability to perform<sup>23</sup>; or B may be released from those obligations because A prevented their performance<sup>24</sup>. Furthermore, if A insists on a mode of performance by B which is contrary to the contract, A cannot subsequently insist on the previous contractual mode of performance in that respect<sup>25</sup>.

1 See para 1002 ante.

2 *Matthews v Smallwood* [1910] 1 Ch 777 at 786-787; *UGS Finance Ltd v National Mortgage Bank of Greece and National Bank of Greece* [1964] 1 Lloyd's Rep 446 at 451, CA; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 426, [1966] 2 All ER 61 at 88, HL; *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 at 57, CA; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 885, [1970] 2 All ER 871 at 896, HL; *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA.

3 *Kendall v Hamilton* (1879) 4 App Cas 504 at 542, HL per Lord Blackburn; *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA.

4 *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama, The Mihailos Xilas* [1979] 2 All ER 1044, [1979] 1 WLR 1018, HL; *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA.

5 See para 1002 note 28 ante.

6 See eg *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL (innocent party performing and demanding payment).

7 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL (shipowner going on with charter after alleged repudiatory delay); *Butler v Croft* (1973) 27 P & CR 1 (assignee of lease entering without landlord's consent); *Aquis Estates Ltd v Minton* [1975] 3 All ER 1043, [1975] 1 WLR 1452, CA (purchaser of lease negotiating with freeholder). See also *Pust v Dowie* (1863) 5 B & S 33; *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274, CA; *Chandris v Isbrandtsen-Moller 7 Co Inc* [1951] 1 KB 240, [1950] 2 All ER 618, CA. But see *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, [1997] 2 All ER 215, PC (no affirmation by acceptance of envelope). Cf *The Brimnes, Tenax Teamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA (late payment). As to the general effect of delay on the part of the innocent party see para 1011 post.

8 *Perry v Davis* (1858) 3 CBNS 769. See also *Farnworth Finance Facilities Ltd v Attryde* [1970] 2 All ER 774, [1970] 1 WLR 1053, CA (hirer of new motor-cycle rode it for 4,000 miles despite defects; hirer continually complained of defects; no affirmation). See also *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281, CA; and CONSUMER CREDIT.

9 *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274, CA; *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp'n of India, The Kanchenjunga* [1987] 2 Lloyd's Rep 509.

10 *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep 583 at 589; *Peyman v Lanjani* [1985] Ch 457 at 493, [1984] 3 All ER 703 at 729, CA, per May LJ, and at 500 and 734 per Slade LJ; *Sea Calm Shipping Co SA v Chantiers Navals de l'Esterel SA, The Uhenbels* [1986] 2 Lloyd's Rep 294 at 298; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp'n of India, The Kanchenjunga* [1987] 2 Lloyd's Rep 509.

11 *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (a firm)* [1979] AC 91, [1978] 1 All ER 515, PC; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

12 *Segal Securities Ltd v Thoseby* [1963] 1 QB 887, [1963] 1 All ER 500.

13 Rescission of the contract and rejection of the goods are not synonymous: *Borrowman, Phillips, & Co v Free & Hollis* (1878) 4 QBD 500, CA; and see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 180.

14 See the Sale of Goods Act 1979 s 11(4) (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 63, 66.

15 See *ibid* s 35(1)(a), (2) (s 35 amended by the Sale and Supply of Goods Act 1994 s 2(1)); see further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 199.

16 See the Sale of Goods Act 1979 s 35(1)(b) (as amended: see note 15 *supra*). The buyer is not deemed to have accepted the goods by doing an act inconsistent with the ownership of the seller unless and until he has had a reasonable opportunity of examining them: see s 35(2) (as so amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 196, 199.

17 See *ibid* s 35(4), (5) (as amended: see note 15 *supra*). Cf *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281, CA (hire-purchase); and see CONSUMER CREDIT. As to the effect of delay in contracts not governed by the Sale of Goods Act 1979 see para 1011 post.

18 See paras 1002 text and note 26, 1005 note 15 *ante*.

19 *Ets Soules & Cie v International Trade Development Co Ltd* [1980] 1 Lloyd's Rep 129, CA; and see para 1012 post. It is not appropriate for B to sue quantum meruit: *Morrison-Knudson Co Inc v British Columbia Hydro and Power Authority* (1978) 85 DLR (3d) 186, BC CA.

20 See para 1005 *ante*. However, the amount of damages may be reduced: see para 1005 note 13 *ante*.

21 *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 KB 543, CA. See also *Cerealmangimi SpA v Toepfer, The Eurometal* [1981] 1 Lloyd's Rep 337; *Bunge Corp'n v Vegetable Vitamin Foods (Private) Ltd* [1985] 1 Lloyd's Rep 613.

22 *Fercometal SARL v Mediterranean Shipping Co SA, The Simona* [1989] AC 788, [1988] 2 All ER 742, HL, where *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 KB 543, CA was reinterpreted as being a case where B accepted the repudiation.

23 *Fercometal SARL v Mediterranean Shipping Co SA, The Simona* [1989] AC 788 at 805-806, [1988] 2 All ER 742 at 752, HL.

24 See para 969 *ante*.

25 *BV Oliehandel Jongkind v Coastal International Ltd* [1983] 2 Lloyd's Rep 463.

## **UPDATE**

### **1010 Loss of right to rescind de futuro: affirmation**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--Affirmation in equity requires the court to see if it would be inequitable to allow the affirming party to set aside the transaction: *Kanda v City & County Properties* [2007] EWHC 3689 (Ch), [2008] BPIR 106.

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### **1011. Affirmation by delay.**

There is no general rule<sup>1</sup> that the innocent party to a broken contract loses the right to rescind if he does not elect to do so within a reasonable time after knowledge of the breach<sup>2</sup>; but, if the lapse of time is such as to lead the party in default to act on the belief that the contract will not be rescinded, the innocent party will lose his right to rescind<sup>3</sup>.

<sup>1</sup> But as to contracts for the sale of goods see para 1010 ante; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 27 et seq.

<sup>2</sup> *Allen v Robles* [1969] 3 All ER 154, [1969] 1 WLR 1193, CA (insurance; failure by insured timeously to inform insurers of claim; insurers repudiated liability after nearly five months from notice of claim); *Wahbe Tamari & Sons Ltd and Jaffa Trading Co v Colprogeca-Sociedade Geral de Fibras, Cafes e Produtos Colonias Lda* [1969] 2 Lloyd's Rep 18 at 22-23 per Megaw J. See also *Marsden v Sambell* (1880) 43 LT 120; *Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 88 LJB 1194; CA; *Berners v Fleming* [1925] Ch 264, CA.

<sup>3</sup> *Allen v Robles* [1969] 3 All ER 154, [1969] 1 WLR 1193, CA; *Wahbe Tamari & Sons Ltd and Jaffa Trading Co v Colprogeca-Sociedade Geral de Fibras, Cafes e Produtos Colonias Lda* [1969] 2 Lloyd's Rep 18 at 23 per Megaw J. See further *Clough v London and North Western Ry Co* (1871) LR 7 Exch 26; and MISREPRESENTATION AND FRAUD.

It is also suggested in *Allen v Robles* supra that the right to rescind for breach is lost, as it is in cases of misrepresentation, by the intervention of the rights of third parties.

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## **E. DAMAGES AND OTHER AVAILABLE REMEDIES FOR BREACH OF CONTRACT**

### **1012. Damages and other available remedies.**

Whether or not a breach of contract gives rise to a right to rescind<sup>1</sup>, it gives the injured party a right of action for damages<sup>2</sup>. Of course, the amount of damages recoverable depends on what has been promised and performed<sup>3</sup>, because the primary purpose of damages for breach of contract is to offer the promisee the value of performance<sup>4</sup>. Whilst the innocent party is entitled to damages as of right, to recover more than nominal damages he must prove loss<sup>5</sup>. The contract may provide for a sum payable as liquidated damages in the event of breach<sup>6</sup>. A claim for damages for breach of contract must be distinguished from a claim for a debt arising under a contract: an action in debt lies upon a primary obligation to pay<sup>7</sup>, whereas an action for breach of contract is a secondary obligation arising from breach of any other primary obligation of performance<sup>8</sup>. There are restrictions on the power to transfer a damages claim<sup>9</sup>; and a claim for more than nominal damages is subject to the rules of remoteness, mitigation and penalties<sup>10</sup>.

In certain cases where damages would be an inadequate remedy, application may be made for an equitable remedy<sup>11</sup>. For example, the injured party may seek a decree of specific performance<sup>12</sup> or, where the obligation is a negative one, for an injunction to restrain breach of the contract<sup>13</sup>. Certain types of contracts may give rise to special remedies, for example the rights of lien<sup>14</sup> and resale<sup>15</sup> under a contract for the sale of goods, or the right to resist repossession of protected goods under a regulated conditional sale or hire-purchase agreement<sup>16</sup>. Furthermore, the breach of contract will generally give the injured party a right of action against any surety<sup>17</sup>.

1 See para 989 et seq ante. Rescission of the contract by the innocent party does not prevent him recovering damages for any loss he has suffered as a result of the breach: see para 1002 ante.

2 As to interest on damages see the Law Reform (Miscellaneous Provisions) Act 1934 s 3; the Administration of Justice Act 1969 s 22; and DAMAGES. As to the periods of limitation within which actions must be brought see generally LIMITATION PERIODS; and as to laches as a bar to relief see EQUITY. For claims based upon quantum meruit see RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

3 *Stocznia Gdanska SA v Latvian Shipping Co*[1998] 1 All ER 883, [1998] 1 WLR 575, HL (first action: damages assessed on basis that second payment to be made; second action: damages assessed on basis that second payment not fallen due).

4 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed': *Robinson v Harman*(1848) 1 Exch 850 at 855 per Baron Parke. See further DAMAGES.

5 As to the principles upon which damages are assessed see generally DAMAGES.

6 For the distinction between liquidated damages and penalties see *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[1915] AC 79, HL.

7 See para 942 ante.

8 See para 1003 ante.

9 Attempts to transfer a damages claim may amount to maintenance or champerty: see para 850 ante.

10 As to remoteness and measure of damages and the principles upon which damages for breach of contract are to be assessed see *Koufos v C Czarnikow Ltd*[1969] 1 AC 350, [1967] 3 All ER 686, HL; and DAMAGES. For further discussion of these matters in relation to particular types of contracts see the relevant titles: eg CARRIAGE AND CARRIERS vol 7 (2008) PARA 773 et seq; SALE OF GOODS AND SUPPLY OF SERVICES; SHIPPING AND MARITIME LAW.

11 Such remedies are discretionary: see para 612 ante. This could be seen in terms of good faith: see para 613 ante.

12 For specific performance of contracts see *Beswick v Beswick*[1968] AC 58, [1967] 2 All ER 1197, HL; and SPECIFIC PERFORMANCE. The court will be slow to grant specific performance, if to do so would require the defendant to undertake difficult or uncertain litigation (*Wroth v Tyler*[1974] Ch 30, [1973] 1 All ER 897) or require constant supervision by the court (*Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*[1998] AC 1, [1997] 3 All ER 297, HL).

13 For injunctions to restrain breaches of contract see *Warner Bros Pictures Inc v Nelson*[1937] 1 KB 209, [1936] 3 All ER 160; and CIVIL PROCEDURE vol 11 (2009) PARA 448 et seq.

14 See the Sale of Goods Act 1979 ss 39(1)(a), 41-43; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 242 et seq. As to lien see generally LIEN.

15 See *ibid* ss 47, 48; and SALE OF GOODS AND SUPPLY OF SERVICES.

16 See the Consumer Credit Act 1974 s 90; and CONSUMER CREDIT vol 9(1) (Reissue) para 265.

17 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq. Rescission after repudiation by the principal debtor does not discharge the liability of the surety: *Moschi v Lep Air Services Ltd*[1973] AC 331, [1972] 2 All ER 393, HL.

## UPDATE

### 1012 Damages and other available remedies

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 2--See *Modahl v British Athletic Federation Ltd* (1999) Times, 27 July, HL (no entitlement to damages for athlete for loss sustained during a period of suspension).

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## **(5) DISCHARGE BY SUBSEQUENT AGREEMENT**

### **(i) Introduction**

#### **1013. In general.**

Contractual obligations may be discharged in a number of ways by agreement between the parties. The obligations discharged may be 'primary' obligations under the contract itself<sup>1</sup> or 'secondary' obligations arising from the breach of the contract<sup>2</sup>. In some cases, the subsequent agreement may involve the discharge of the whole of the contractual obligations between the parties. In other cases only part of the obligations may be discharged; or the agreement may not discharge any obligation under the contract, but only suspend the right to demand its performance. The types of discharging or suspensory agreements may be summarised as follows: (1) the parties may altogether terminate the contract by an agreement to rescind<sup>3</sup>; or (2) the parties may terminate or alter some obligations under the contract by an agreement to vary<sup>4</sup>; (3) one party may waive certain rights under the contract<sup>5</sup>; or (4) one party may be bound by a representation made by him that he will not enforce his strict rights under the contract, but neither in this case nor in case (3) above will such action generally extinguish those rights<sup>6</sup>; (5) the parties may, by novation, discharge one party to the contract and create a new contract involving a new party in substitution for the one discharged<sup>7</sup>; and (6) a contractual obligation may be discharged by an accord and satisfaction between the parties<sup>8</sup>, or a release by deed granted by one of them<sup>9</sup>.

1    Ie the obligation of performance created by the contract itself.

2    Ie the obligation to pay damages created by a breach: see para 1003 ante. In this context primary and secondary obligations are to a large extent run together. Thus the ideas of accord and satisfaction (see para 1043 et seq post) and release (see para 1052 et seq post) are commonly used in respect of discharge of contracts wholly performed on one side though there may be no breach.

3    See para 1014 et seq post.

4    See para 1019 et seq post.

5    See para 1025 et seq post.

6    See para 1030 et seq post.

7    See para 1036 et seq post.

8    See para 1043 et seq post.

9    See para 1052 et seq post.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(ii) Rescission by Agreement/1014. In general.

## (ii) Rescission by Agreement

### 1014. In general.

Where a contract is executory<sup>1</sup> on both sides, the parties may terminate it by mutual consent<sup>2</sup> (commonly achieved by a simple contract<sup>3</sup>), and this will be so whether the obligation is indefinite or limited in point of time, or provides that it shall be determinable by notice<sup>4</sup> or otherwise. Such rescission<sup>5</sup> may take the form of an express agreement<sup>6</sup> or may be inferred from conduct (as where neither party has insisted on performance of the contract for a long period of time<sup>7</sup>, or where the parties have acted in a manner inconsistent with the continuance of the contract<sup>8</sup>, or have made a new contract)<sup>9</sup>. The consideration for the contract of discharge will usually lie in the abandonment by each side of their rights under the previous (wholly executory) contract<sup>10</sup>. The effect of such rescission by agreement is considered later<sup>11</sup>, as is the question whether a new agreement rescinds a prior contract or simply varies it<sup>12</sup>.

The fact that a contract entered into by two parties is for the benefit of a third person does not at common law necessarily preclude the parties to the agreement from rescinding it by a further agreement<sup>13</sup>.

In commercial disputes, the courts have used the above rules to infer that the parties have agreed to abandon their contract<sup>14</sup>, commonly by implication<sup>15</sup>. In the case of the prolonged failure by both sides to refer to, or proceed with, an arbitration, there may be an implied agreement to abandon<sup>16</sup>, or one party may be estopped from denying it<sup>17</sup>.

<sup>1</sup> I.e. where neither party has completely performed his obligations under the contract. See further paras 606 ante, 1016 post.

<sup>2</sup> *Coniers v Holland* (1588) 2 Leon 214; *Treswaller v Keyne* (1621) Cro Jac 620; *Langden v Stokes* (1634) Cro Car 383; *Cook v Newcombe* (1662) T Raym 42; *May v King* (1701) 12 Mod Rep 537; *Robinson v Page* (1826) 3 Russ 114; *Edwards v Chapman* (1836) 1 M & W 231; *King v Gillett* (1840) 7 M & W 55; *Foster v Dawber* (1851) 6 Exch 839; *Kelsey v Dodd* (1881) 52 LJ Ch 34; *Rose and Frank Co v JR Crompton & Bros Ltd* [1925] AC 445, HL.

<sup>3</sup> See para 1016 post. Distinguish a release, which is usually by deed: see para 1052 et seq post.

<sup>4</sup> See eg *Rose and Frank Co v JR Crompton & Bros Ltd* [1925] AC 445, HL; *Cannon v Miles* [1974] 2 Lloyd's Rep 129, CA.

<sup>5</sup> As to the form of rescission see para 1018 post. This kind of rescission should be distinguished from rescission for breach or rescission for such matters as misrepresentation: see para 986 et seq ante. Distinguish also mere modification of the contract or an alteration in the method of performance, which may amount to variation or waiver respectively: see paras 1019-1029 post.

<sup>6</sup> See eg *King v Gillett* (1840) 7 M & W 55.

<sup>7</sup> *Davis v Bomford* (1860) 6 H & N 245 (agreement to marry, with subsequent total cessation of social intercourse and correspondence); *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 752, HL (option to buy land apparently not exercised).

<sup>8</sup> *Morgan v Bain* (1874) LR 10 CP 15 (notice of insolvency sent by buyer to seller); *Kelsey v Dodd* (1881) 52 LJ Ch 34 (long continued acquiescence in breaches of covenant not to carry on a specified trade); *Bond v Walford* (1886) 32 ChD 238 (marriage settlement set aside after engagement to marry broken off); cf paras 1010-1011 ante, 1028 note 2 post. A separation agreement between husband and wife may be discharged by reconciliation and resumption of cohabitation: see *Rowell v Rowell* [1900] 1 QB 9, CA. For the effect of long

acquiescence in breaches of contract by a landlord see *City and Westminster Properties (1934) Ltd v Mudd*[1959] Ch 129, [1958] 2 All ER 733; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 506.

9 Where by express agreement or by conduct a new contract is substituted for the original one and the new contract contains no express provision as to payment, payment may be recovered on the basis of quantum meruit: *Steven v Bromley & Son*[1919] 2 KB 722, CA; cf *Chandris v Isbrandtsen-Moller Co Inc*[1951] 1 KB 240, [1950] 1 All ER 768; revsd on another point [1951] 1 KB 240 at 256, [1950] 2 All ER 618, CA. Cf para 923 note 4 ante.

As to quantum meruit as a contractual and restitutionary remedy see para 618 ante; RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq. As to variation see para 1019 et seq post.

10 See para 1016 et seq post.

11 See para 1015 post.

12 See para 1024 post.

13 See para 749 ante. As to a proposed alteration of this rule see para 763 ante.

14 *Pearl Mill Co Ltd v Ivy Tannery Co Ltd*[1919] 1 KB 78 (sale of goods with inordinate delay on both sides); *GW Fisher Ltd v Eastwoods Ltd*[1936] 1 All ER 421 (abandonment of contract of sale by reason of long delay); cf *MSC Mediterranean Shipping Co SA v BRE Metro Ltd* [1985] 2 Lloyd's Rep 239 (plaintiff had not abandoned the contract, but accepted defendant's wrongful repudiation as bringing an end to it: see further para 1008 ante). For the situation where both parties were held to be in breach see para 1009 ante. See also the cases on formation of contract in para 631 ante.

15 *Collin v Duke of Westminster*[1985] QB 581, [1985] 1 All ER 463, CA (no implied abandonment of claim); and see the cases cited in note 7 supra.

16 *Andre & Cie SA v Marine Transocean Ltd, The Splendid Sun*[1981] QB 694, [1981] 2 All ER 993, CA (dispute under charterparty referred to arbitration; delay of eight years without communication before owner delivered points of claim; held to be implied abandonment of arbitration); *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal*[1983] 1 AC 854, [1983] 1 All ER 34, HL (see also para 1009 ante); *Tracomin SA v Anton C Nielsen A/S* [1984] 2 Lloyd's Rep 195 (dispute in sale of goods; arbitration agreed but abandonment inferred from inactivity over five years); *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D*[1985] 2 All ER 796, [1985] 1 WLR 925, CA (arbitration under a time charter; mere silence for five years did not amount to implied abandonment); *Cie Francaise d'Importation et de Distribution SA v Deutsche Continental Handelsgesellschaft* [1985] 2 Lloyd's Rep 592; *Excomm Ltd v Guan Guan Shipping (Pte) Ltd* [1987] 1 Lloyd's Rep 330 (carriage of goods; arbitration commenced; delay constituted offer and acceptance to abandon); *Food Corp'n of India v Antclizo Shipping Corp'n, The Antclizo*[1988] 2 All ER 513, [1988] 1 WLR 603, HL (no abandonment by inactivity); *Thai-Europe Tapioca Service Ltd v Seine Navigation Co Inc, The Maritime Winner* [1989] 2 Lloyd's Rep 506 (no abandonment).

The arbitration tribunal has power to dismiss the claim if it is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or has caused, or is likely to cause, serious prejudice to the respondent: see the Arbitration Act 1996 s 41(3); and ARBITRATION vol 2 (2008) PARA 1250.

17 *Tracomin SA v Anton C Nielsen A/S* [1984] 2 Lloyd's Rep 195 (during the five year delay the buyer indicated that he was suing a third party in the Danish courts; and in due course the seller destroyed the relevant documentation; buyer held estopped from denying abandonment); *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D*[1985] 2 All ER 796, [1985] 1 WLR 925, CA (no unequivocal representation such as would raise an equitable estoppel); *Cie Francaise d'Importation et de Distribution SA v Deutsche Continental Handelsgesellschaft* [1985] 2 Lloyd's Rep 592.

## UPDATE

### 1014 In general

NOTE 10--See *Compagnie Noga D'Importation et D'Exportation SA v Abacha (as personal representatives of Sani Abacha) (No 2)*[2003] EWCA Civ 1100, [2003] 2 All ER (Comm) 915 (consideration provided by mutual release of executory promises).

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### **1015. Effect of rescission by agreement.**

Where a contract has been rescinded by agreement it cannot afterwards be set up again by one of the parties against the other party<sup>1</sup>. However, the parties may 'renew' a rescinded contract by making a new agreement on the same terms as the rescinded contract<sup>2</sup>, or by providing, in the agreement for rescission, that the original contract shall be effective again in certain events<sup>3</sup>. Similarly, the rescission may be conditional, so that in the event of the condition being unfulfilled the contract remains in full effect<sup>4</sup>.

Money paid by one of the parties under a contract rescinded by agreement can be recovered back as money had and received<sup>5</sup>, provided that there has been a total failure of consideration<sup>6</sup>. Where services have been performed under the rescinded contract but not paid for, payment for them may be recovered if the parties have agreed, expressly or impliedly, that such payment should be made, but not otherwise<sup>7</sup>. Where, however, the contract is severable, payment may be recovered for those severable portions which have been completely performed before discharge<sup>8</sup>.

Where, under a lump sum contract for services, further services are rendered in addition to those originally contemplated by the contractor, no extra remuneration may be recovered by him unless before rendering the further services he informed the other party of his intention to treat the original contract as discharged<sup>9</sup>.

<sup>1</sup> *Rushbrook v Lawrence* (1869) LR 8 Eq 25 (affd 5 Ch App 3); and see *Henderson v Underwriting and Agency Association Ltd* (1891) 65 LT 732, CA; *Andre & Cie SA v Marine Transocean Ltd, The Splendid Sun* [1981] QB 694, [1981] 2 All ER 993, CA.

<sup>2</sup> This is a matter of intention: see eg *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1973] 1 All ER 769, sub nom *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA, The Brimnes* [1973] 1 WLR 386 (implied renewal of contract from acceptance of payment); affd on other grounds *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1975] QB 929, [1974] 3 All ER 88, CA. The apparently contrary cases of *R v Gresham Inhabitants* (1786) 1 Term Rep 101 and *R v St Philip in Birmingham Inhabitants* (1788) 2 Term Rep 624 are cases on continuity of service for the purposes of establishing a settlement under the old poor law and are not, it is submitted, authorities against the proposition stated in the text.

<sup>3</sup> See eg *Raggow v Scougall & Co* (1915) 31 TLR 564, DC (a case of variation); see further para 1022 text and note 3 post.

<sup>4</sup> *Firth v Midland Rly Co* (1875) LR 20 Eq 100. Similarly, the acceptance of a new lease by a tenant operates as a surrender in law of the existing lease; but it is conditional upon the new lease being valid: see *Doe d Earl of Egremont v Courtenay* (1848) 11 QB 702; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) paras 632, 634.

<sup>5</sup> *Davis v Street* (1823) 1 C & P 18. As to money had and received see RESTITUTION vol 40(1) (2007 Reissue) para 5.

<sup>6</sup> *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, CA. As to total failure of consideration see RESTITUTION vol 40(1) (2007 Reissue) para 87 et seq.

<sup>7</sup> *Lamburn v Cruden* (1841) 2 Man & G 253; *Patmore v Colburn* (1834) 1 Cr M & R 65. Where the contract has been rescinded as a result of breach by one party, the innocent party may not merely recover damages for breach of contract, but may sue on a quantum meruit for the value of his services: see *Planché v Colburn* (1831) 8 Bing 14; and RESTITUTION vol 40(1) (2007 Reissue) paras 14, 114-115. Quaere whether this principle could be applied where the contract is rescinded by agreement. As to return of premiums where a partnership is prematurely dissolved see the Partnership Act 1890 s 40; and PARTNERSHIP vol 79 (2008) PARAS 192-193. As to the effect of rescission upon a surety who guaranteed performance of the original contract see *Re Nataf*

*Investment Co, Nevill's Case* (1870) 6 Ch App 43; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1214 et seq.

8 See generally para 922 ante.

9 See BUILDING CONTRACTS, ARCHITECTS, ENGINEERS VALUERS AND SURVEYORS vol 4(3) (Reissue) para 272; cf paras 787, 923 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(ii) Rescission by Agreement/1016. Agreement for rescission must itself amount to a contract.

**1016. Agreement for rescission must itself amount to a contract.**

In order to operate as a discharge of the contract an agreement to rescind must itself possess the characteristics of a valid contract<sup>1</sup>. Thus both parties must consent<sup>2</sup> to the discharge of the contract and the agreement must<sup>3</sup> either be made by deed<sup>4</sup> or be supported by consideration<sup>5</sup>. However, consideration will always be present where the contract is executory<sup>6</sup> on both sides, for it will be found in the mutual abandonment of the rights to performance or further performance under the contract<sup>7</sup>. Where the contract has been fully performed by one party the mere agreement to rescind will not generate its own consideration in this way; and (unless the agreement is made by deed) there must, in technical language, be an 'accord' (that is the agreement) and 'satisfaction' (that is some further consideration moving from the party who has not yet fully performed)<sup>8</sup>.

1 'Abandonment of a contract, according to the law of this court, is a contract in itself': *Moore v Crofton* (1846) 3 Jo & Lat 438 at 445 per Sugden LC. As to the requirements of a valid contract see para 603 ante. As to the form of rescission see para 1018 post.

2 *Robinson v Page* (1826) 3 Russ 114; *Phillpotts v Evans* (1839) 5 M & W 475; *Lewis v Clifton* (1854) 14 CB 245; *Heinekey v Earle* (1857) 8 E & B 410 (affd (1858) 8 E & B 427); *Whittaker v Fox* (1865) 13 LT 588. Consent for formation of a contract generally means an 'objective' consent (see para 701 et seq ante) and the same will be true here: see also para 1023 note 3 post.

3 But cf the doctrine of promissory estoppel, as to which see para 1030 et seq post.

4 This is commonly known as a 'release': see further para 1052 et seq post.

5 *Raggow v Scougall & Co* (1915) 31 TLR 564, DC (a case of variation); *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796, [1985] 1 WLR 925, CA. As to what constitutes consideration in general see para 727 et seq ante. For the exceptional case of bills of exchange see para 1017 post.

6 For the meaning of 'executory' see para 1014 note 1 ante.

7 *Scarf v Jardine* (1882) 7 App Cas 345 at 351, HL, per Lord Selborne LC; *Foster v Dawber* (1851) 6 Exch 839 at 851; *Headfort v Brocket* [1966] IR 227 at 261 per Budd J. Cf, however, para 1023 notes 9-10. As to consideration see paras 727 et seq ante, 1045 post.

Where the rescission arises from the substitution of a new, inconsistent, contract it has been said that the same consideration serves both to rescind the original contract and to support the new one (*Stead v Dawber* (1839) 10 Ad & El 57), but this does not seem to be correct. The consideration for the rescission lies in the mutual surrender of rights: the consideration for the new contract lies in the mutual promises to perform that contract. The statement might, however, be correct when the rescinded contract was only executory on one side, in respect of the consideration supplied by that side.

8 The expression 'accord and satisfaction' is most commonly used in connection with discharge of a right of action for breach of contract or with part payment of a debt: see para 1043 et seq post. However, the principles are the same where, before breach, the parties agree to rescind the contract, although one party has already fully performed.

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**1017. Bills of exchange.**

Bills of exchange and promissory notes form an exception to the general rule that a contract may not be rescinded except by deed or for consideration<sup>1</sup>. Bills of exchange and promissory notes may be discharged by the holder absolutely and unconditionally renouncing his rights against the acceptor or other party at or after the maturity of the bill or note. Such renunciation must be in writing unless the bill or note is delivered up to the acceptor, but no consideration is necessary for it<sup>2</sup>.

<sup>1</sup> See para 1016 ante.

<sup>2</sup> See the Bills of Exchange Act 1882 ss 62, 89; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1550 et seq. As to cancellation see ss 21(1), 34(4), 63; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1556.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(ii) Rescission by Agreement/1018. Form of rescission.

### **1018. Form of rescission.**

In modern law, no particular form is required for an agreement rescinding a contract<sup>1</sup>. Thus a contract made by deed may be rescinded by a written or oral agreement<sup>2</sup>; and a contract required by law to be evidenced in writing<sup>3</sup> may be similarly rescinded<sup>4</sup>. If the rescission of a contract required by statute to be evidenced in writing takes the form of a new and inconsistent contract which is required by law to be evidenced in writing, it will nevertheless be effective to rescind the original contract even though it may itself be unenforceable for want of writing<sup>5</sup>. The question whether such a new agreement seeks to rescind the original contract or merely to vary its terms (in which case it will be ineffective) is considered later<sup>6</sup>.

A contract for the sale or other disposition of an interest in land is required by statute to be in writing<sup>7</sup>; but it seems that it can nevertheless be discharged orally<sup>8</sup>. Under the Consumer Credit Act 1974, a cancellable regulated agreement may be cancelled in certain circumstances<sup>9</sup>; and a regulated hire purchase or conditional sale agreement may be terminated by the debtor or hirer<sup>10</sup>. Presumably any regulated agreement may be rescinded in accordance with the common law principles here considered<sup>11</sup>.

1 At common law a contract made by deed could only be rescinded by an agreement made by deed (*Kaye v Waghorn* (1809) 1 Taunt 428; cf *Nash v Armstrong* (1861) 10 CBNS 259); but this rule was not recognised in equity (*Webb v Hewitt* (1857) 3 K & J 438) and the equitable rule now prevails: see the Supreme Court Act 1981 s 49(1); and EQUITY vol 16(2) (Reissue) para 500.

Contracts made by deed usually no longer require a seal: see para 616 ante. As to deeds see generally DEEDS AND OTHER INSTRUMENTS.

2 *Ward v Livesey* (1887) 5 RPC 102; *Steeds v Steeds* (1889) 22 QBD 537, DC; *Berry v Berry* [1929] 2 KB 316; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 133, [1956] 1 All ER 256n at 258, obiter per Denning J; and see note 1 supra.

3 For contracts required by law to be evidenced in writing see para 623 ante. The rule here stated is, a fortiori, true for contracts which are in writing though not required by law to be so: see para 1024 post. There is no authority on this point in relation to contracts which are required by law to be in writing (as opposed to being evidenced in writing) but the same principles presumably apply.

4 *Goman v Salisbury* (1684) 1 Vern 240; *Price v Dyer* (1810) 17 Ves 356; *Robinson v Page* (1826) 3 Russ 114; *Goss v Lord Nugent* (1833) 5 B & Ad 58; *Vezey v Rashleigh* [1904] 1 Ch 634; *Morris v Baron & Co* [1918] AC 1, HL; *British and Beningtons Ltd v North Western Cachar Tea Co* [1923] AC 48, HL.

5 *Morris v Baron & Co* [1918] AC 1, HL.

6 See para 1024 post.

7 See para 624 ante.

8 See note 3 supra.

9 See the Consumer Credit Act 1974 ss 67-69; and CONSUMER CREDIT vol 9(1) (Reissue) paras 184-185.

10 See *ibid* s 99; and CONSUMER CREDIT vol 9(1) (Reissue) para 257.

11 *Ie* in this paragraph and in paras 1014-1017 ante.

### **UPDATE**

**1018-1019 Form of rescission, In general**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

**1018 Form of rescission**

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).



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### (iii) Variation

#### 1019. In general.

At common law<sup>1</sup>, a distinction must be drawn between a consensual and a unilateral variation.

A consensual variation is where the parties to a contract agree in a subsequent simple contract<sup>2</sup> to vary its terms<sup>3</sup> as between the parties to the original contract<sup>4</sup> by way of a second contract<sup>5</sup>. In a regulated agreement, the manner of consensual variation is controlled by the Consumer Credit Act 1974<sup>6</sup>.

At common law, one party cannot unilaterally validly vary the terms of the contract<sup>7</sup> (except by way of release<sup>8</sup>), but such unilateral variation may constitute a repudiation of the contract by him<sup>9</sup>. However, the original contract may validly grant to one of the contracting parties a unilateral power of variation<sup>10</sup>. For instance, a contract for the sale of goods may provide the seller with a price escalation clause<sup>11</sup>; and a loan may grant the lender a unilateral right to vary the rate of interest charged<sup>12</sup>. Where such a unilateral power of variation is found in a consumer sale or supply of goods or services, it may amount to an unfair term<sup>13</sup>. Moreover, where it is found in a regulated agreement, statute allows one party unilaterally to vary the agreement without cause in certain circumstances<sup>14</sup>.

An alteration of some non-contractual agreement which was preliminary to the formation of the contract does not take effect as a variation but as an original term of the contract<sup>15</sup>. Whether such an alteration was made before or after the formation of the contract is a matter of evidence; but at least in the case of a deed the presumption is that the alteration was made before execution<sup>16</sup>. In the case of a written contract, an unauthorised material alteration of the document will discharge the contract<sup>17</sup>.

A variation must also be distinguished from an elucidation of the contract, something which only expresses more accurately the original intention of the parties, as by filling in details which were agreed upon before the contract was signed<sup>18</sup>, or correcting a mistake which was made when the contract was reduced to writing<sup>19</sup>. In the case of a regulated agreement, this would make it not properly executed<sup>20</sup>.

1 For statutory modification see para 1021 post.

2 Distinguish subsequent agreements which do not amount to a simple contract: see waiver (see para 1025 et seq post post); equitable estoppel (see para 1030 et seq post); and release (see para 1052 et seq post).

3 Distinguish those subsequent agreements which discharge the whole of the first contract: see rescission by agreement (para 1014 et seq ante); release (para 1052 et seq post). As to the distinction between variation and rescission see para 1024 post.

4 Distinguish novation, where a new party is substituted: see para 1036 et seq post.

5 See para 1020 post. As to accord and satisfaction see para 1043 et seq post.

6 See the Consumer Credit Act 1974 s 82; and CONSUMER CREDIT vol 9(1) (Reissue) para 191.

7 *Morris v CH Bailey Ltd* [1969] 2 Lloyd's Rep 215, CA.

8 As to release see para 1052 et seq post.

9 An acceptance of the repudiation by the innocent party does not constitute a variation of the contract: *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL. As to repudiation see para 997 et seq ante.

10 *Page v Liverpool Victoria Friendly Society* (1927) 43 TLR 712, CA; *Yeo v Stewart* [1947] 2 All ER 28.

11 *May & Butcher Ltd v R* (1929) [1934] 2 KB 17n at 21n, HL. See also *Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd* [1979] 1 All ER 965, [1979] 1 WLR 401, CA (seller's claim that the contract included a price escalation clause rejected); *Finland Steamship Co Ltd v Felixstowe Dock and Rly Co* [1980] 2 Lloyd's Rep 287 (traffic handling agreement).

12 *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918, CA.

13 See the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 4(4), Sch 3 paras (j), (l); and para 794 ante.

14 See the Consumer Credit Act 1974 ss 67-69 (see CONSUMER CREDIT vol 9(1) (Reissue) paras 184-185); s 89 (see CONSUMER CREDIT vol 9(1) (Reissue) para 264); s 94 (see CONSUMER CREDIT vol 9(1) (Reissue) para 251).

15 See eg *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805, [1951] 1 All ER 631, CA. As to the extent to which the court may look at alterations in the pre-contract 'agreement' as an aid to the interpretation of the contract see para 622 ante.

16 *Doe d Tatum v Catomore* (1851) 16 QB 745; *Simmons v Rudall* (1851) 1 Sim NS 115 at 136; *Williams v Ashton* (1860) 1 John & H 115 at 118; see further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 81. As to whether a new stamp is necessary where a deed is varied after execution see *Hill v Patten* (1807) 8 East 373; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) para 1017.

17 See para 1056 et seq post.

18 *Hudson v Revett* (1829) 5 Bing 368; *Rudd v Bowles* [1912] 2 Ch 60. As to documents signed in blank see generally para 708 ante.

19 *Bluck v Gomperz* (1852) 7 Exch 862; *Earl of Falmouth v Roberts* (1842) 9 M & W 469. As to what alterations are material see para 1058 post.

20 See the Consumer Credit Act 1974 ss 61(1)(b), 65; and CONSUMER CREDIT vol 9(1) (Reissue) paras 160, 169.

## UPDATE

### 1018-1019 Form of rescission, In general

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### 1019 In general

NOTE 10--See *Hayes v Security and Facilities Division* (2000) Times, 26 April, CA (employer had no power under terms of employment contract to unilaterally reduce employees' subsistence allowance).

NOTE 13--SI 1994/3159 reg 4(4), Sch 3 para 1(j), (l) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(5), Sch 2 para 1(j), (l).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(iii) Variation/1020. Consensual variation.

### **1020. Consensual variation.**

Obligations undertaken in one contract<sup>1</sup> may be varied in another<sup>2</sup>, even if the former contract were made by deed<sup>3</sup>. Consensual variation may be by express agreement<sup>4</sup> or may be implied by conduct<sup>5</sup>. The consensual variation must itself amount to a contract<sup>6</sup>. A consensual variation of a prior main contract should be distinguished from a collateral contract formed when a previous offer to enter a collateral contract is thereafter accepted by entry in to the main contract<sup>7</sup>.

Where there are several parties to a contract, the contract may be varied with the consent of all parties<sup>8</sup>. A deed between several parties may be varied, after execution, by some of the parties with the consent of those parties who have not executed it, so long as the alteration does not in any way affect the rights or liabilities of the parties who have already executed the agreement<sup>9</sup>.

1 As to the formation of contract see para 629 et seq ante.

2 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA (currency risk); *Bunge SA v Kruse* [1977] 1 Lloyd's Rep 492, CA (compromise settlement).

3 *Berry v Berry* [1929] 2 KB 316.

4 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA.

5 *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388. See also *Electronic Industries Ltd v David Jones Ltd* (1954) 91 CLR 288, Aust HC; and *Grogan v Robin Meredith Plant Hire* (1996) 15 Tr LR 371, CA (no implication).

6 See para 1023 post. As to its form see para 1024 post.

7 *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733; *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA. As to the formation of collateral contracts see para 753 ante.

8 *Hill v Patten* (1807) 8 East 373; *Campbell v Christie* (1817) 2 Stark 64; *Fairlie v Christie* (1817) 7 Taunt 416.

9 *Doe d Lewis v Bingham* (1821) 4 B & Ald 672; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 82.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(iii) Variation/1021. Modification by statute.

### **1021. Modification by statute.**

In the case of some contracts which have been entered into upon terms which are not in accordance with statutory provisions, the contracts are automatically modified by the relevant statutes so as to accord with those provisions, and take effect as if those provisions were incorporated in them<sup>1</sup>. In other cases, a statute, although it does not automatically modify the particular class of contracts to which it relates, confers power under which contracts and contractual obligations of that class may be modified individually<sup>2</sup>. The rights and liabilities under a contract may be transferred, or their operation may otherwise be modified, on the transfer by statute of undertakings of particular classes from public ownership<sup>3</sup>.

For the purposes of any contract or order for the production of defence materials, any person authorised by a competent authority may use technical information which he possesses, and supply articles produced through using that information, discharged from any restriction imposed by any agreement to which he is a party and from any obligation to make payments under such an agreement in respect of that use or supply<sup>4</sup>.

In consumer supplies of goods and services, the contract may be modified in the sense that unfair terms are not binding on consumers<sup>5</sup>; and there are some other statutory provisions which render void, or enable a court to avoid on grounds of unreasonableness, terms in particular types of contract<sup>6</sup>. This is particularly the case in respect of regulated agreements under the Consumer Credit Act 1974<sup>7</sup>.

1 See eg the Race Relations Act 1976 s 72 (as amended); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

2 See eg the Fire Precautions Act 1971 s 28 (as amended); and FIRE SERVICES.

3 See eg EMPLOYMENT vol 39 (2009) PARAS 111-115; FUEL AND ENERGY; MINES, MINERALS AND QUARRIES; RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES; WATER AND WATERWAYS.

4 See the Defence Contracts Act 1958 s 2; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) para 588.

5 See the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 5; and para 795 ante.

6 Especially under the Unfair Contract Terms Act 1977: see para 820 et seq ante.

7 See the Consumer Credit Act 1974 s 173; and CONSUMER CREDIT vol 9(1) (Reissue) para 199. See also paras 819, 1018-1019 ante, 1076 post.

## **UPDATE**

### **1021 Modification by statute**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 2--1971 Act replaced: Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541.

NOTE 5--SI 1994/3159 reg 5 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 8.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(iii) Variation/1022. Effect of variation.

### 1022. Effect of variation.

Where a contract is varied it operates according to the variation<sup>1</sup> and the original terms cannot be set up by one of the parties against the other. Where, however, the variation is conditional upon the new terms being capable of performance, and they prove not to be so capable, the original terms of the agreement may be enforced<sup>2</sup>. Furthermore, the agreement for variation may itself provide that in certain events the contract is to take effect in its original form<sup>3</sup>. It is, of course, always possible for the parties by agreement to make a further variation restoring the contract to its original form.

Where a building contract for the execution of specified work by a certain date is varied to provide for extra work being done under it but the time for performance is not expressly extended, it is a question of construction whether the original time limited for performance still applies<sup>4</sup>, or whether that date is extended<sup>5</sup>.

1 As to the distinction between a variation and a rescission by the making of a new contract (albeit by one containing some of the terms of the original contract) see para 1024 post.

2 *Firth v Midland Rly Co* (1875) LR 20 Eq 100.

3 *Raggow v Scougall & Co* (1915) 31 TLR 564, DC.

4 *Macintosh v Midland Counties Rly Co* (1845) 14 M & W 548; *Legge v Harlock* (1848) 12 QB 1015; *Jones v St John's College, Oxford* (1870) LR 6 QB 115; *Tew v Newbold-on-Avon United District School Board* (1884) 1 Cab & El 260; and see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS. As to payment on the basis of quantum meruit where, although the contract allows for the ordering of extra work, the builder alleges that the work actually ordered is so great as to go beyond the scope of the contract see *Sir Lindsay Parkinson & Co Ltd v Works and Building Comrs* [1949] 2 KB 632, [1950] 1 All ER 208, CA.

5 *Holme v Guppy* (1838) 3 M & W 387; *Russell v Viscount SA da Bandeira* (1862) 13 CBNS 149; *Dodd v Churton* [1897] 1 QB 562, CA; *Astilleros Canarios SA v Cape Hatteras Shipping Co Inc, The Cape Hatteras* [1982] 1 Lloyd's Rep 518.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(iii) Variation/1023. Agreement for variation must itself amount to a contract.

### **1023. Agreement for variation must itself amount to a contract.**

Since a variation, as opposed to a waiver<sup>1</sup>, involves an alteration by way of contract of the contractual relations between the parties, the agreement for variation must itself possess the characteristics of a valid contract<sup>2</sup>. Thus to effect a variation the parties must be *ad idem* in the same sense as for the formation of a contract<sup>3</sup>, and negotiations for variation which do not result in agreement have no such effect<sup>4</sup>. Further, the agreement for variation must be supported by consideration<sup>5</sup> or made by deed<sup>6</sup>. Where the contract is still executory<sup>7</sup> on both sides, consideration may be found in the mutual surrender of rights or the conferment of benefits on each party<sup>8</sup> by the variation. However, where the variation is capable of benefiting only one party, it will not generate its own consideration<sup>9</sup>; and the same will be true even where the variation is capable of benefiting either party but is in fact made only for the benefit of one<sup>10</sup>. Where one party has fully performed his side of the contract and the other party's performance has fallen due<sup>11</sup>, no informal variation can be effective unless it imposes some new obligation upon the latter<sup>12</sup>, as with an accord and satisfaction<sup>13</sup>. The position with regard to performance of an existing obligation as consideration for a new promise seems to be that if it is possible to find some extra consideration as well, there is a contract of variation<sup>14</sup>; but not otherwise<sup>15</sup>.

The common law position with regard to compromises of disputed claims is as follows. Where there is a dispute as to whether any money is owed, a bona fide agreement to pay a lesser sum is a binding compromise<sup>16</sup>. Where the dispute is over the amount owed and the creditor accepts a lesser sum, and there is no additional benefit by way of consideration, there is no accord and satisfaction<sup>17</sup>, so the creditor can sue for the balance<sup>18</sup> (unless this is inequitable<sup>19</sup>). However, if the debtor bona fide disputes the amount paid, or raises a counterclaim, there is a binding compromise<sup>20</sup>.

It is a good defence to an action for breach of contract to show that it has been validly compromised<sup>21</sup>.

1 See para 1025 et seq post.

2 As to the requirements of a valid contract see para 603 ante.

3 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL (buyers of cocoa offered variation of terms in letter of 20 September; sellers replied granting a variation in different terms on 30 September; even if it could be said (which it could not) that the buyers' interpretation of the sellers' letter was as reasonable as that of the sellers', they were not sufficiently *ad idem* to vary the contract). The negotiations leading to a variation will usually be capable of analysis in terms of offer and acceptance: see eg *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 217, [1972] 2 All ER 127 at 144-145, CA, per Megaw LJ. See also *Burnett v Westminster Bank Ltd* [1966] 1 QB 742, [1965] 3 All ER 81 (what constitutes reasonable notice of proposed variation in banker-customer relationship).

4 *Davies v Sweet* [1962] 2 QB 300 at 306, [1962] 1 All ER 92 at 94, CA, per Danckwerts LJ; and see further para 667 ante.

5 As to consideration in general see para 727 et seq ante.

6 As to contracts made by deed see generally para 616 et seq ante. See also *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632, [1950] 1 All ER 208, CA.

7 For the meaning of 'executory' see para 1014 note 1 ante.

8 *Fenner v Blake* [1900] 1 QB 426, DC; *Re William Porter & Co Ltd* [1937] 2 All ER 361; *Autair International Airways Ltd v Claydon Aviation Ltd* [1965] 1 Lloyd's Rep 74; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL; *Ficom SA v Sociedad Cadex Ltda* [1980] 2 Lloyd's Rep 118.

9 See note 12 infra. The distinction here between variation and rescission (see para 1024 post; for effectiveness of rescission see para 1014 ante) may be a fine one, but it is vital. Thus if on 1 January A agrees to buy B's car for £500 for delivery and payment on 3 January, but on 2 January B agrees to accept £400, the agreement of 2 January would be binding if the transaction were viewed as a rescission of the first contract and the formation of a new contract for £400; but if the transaction is viewed as a variation it will not bind B. Whether the transaction was a rescission or a variation would depend upon the intention of the parties: see para 1024 post.

10 *Vanbergen v St Edmunds Properties Ltd* [1933] 2 KB 223, CA (variation of place of payment for benefit of debtor). Note, however, that in this case the contract was executory on one side only.

11 Payment of part of a debt before the due date at the request of the creditor will amount to consideration: see para 1045 post.

12 See para 1045 post. But such an unsuccessful variation may have some effect as a waiver (see para 1025 et seq post) or upon the basis of promissory estoppel (see para 1030 et seq post). Note also that the effect of this rule is mitigated by the fact that a compromise of an unliquidated (*Wilkinson v Byers* (1834) 1 Ad & El 106) or disputed (*Cooper v Parker* (1855) 15 CB 822, Ex Ch) claim generates its own consideration: see further paras 740 ante, 1045 post.

13 As to accord and satisfaction see para 1043 et seq post.

14 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA (where there may be a variation on the basis that either some new consideration was provided, or that a factual benefit amounted to consideration: see para 747 notes 12-15 ante).

15 *Stilk v Myrick* (1809) 2 Camp 317 (see para 747 ante).

16 *Cook v Wright* (1861) 1 B & S 559; and see para 741 ante.

17 *Ferguson v Davies* [1997] 1 All ER 315, CA; and see further paras 1044 note 4, 1045 note 6 post).

18 *Foakes v Beer* (1884) 9 App Cas 605, HL; and see paras 747 ante, 1045 post.

19 *D & C Builders Ltd v Rees* [1966] 2 QB 617 at 625, [1965] 3 All ER 837 at 841, CA, per Lord Denning MR; and see para 1033 note 7 post.

20 *Cook v Wright* (1861) 1 B & S 559. As to compromises see para 740 ante.

21 *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, CA.

## UPDATE

### 1023 Agreement for variation must itself amount to a contract

NOTE 15--See *Compagnie Noga D'Importation et D'Exportation SA v Abacha (as personal representatives of Sani Abacha) (No 2)* [2003] EWCA Civ 1100, [2003] 2 All ER (Comm) 915 (principle that a promise to perform an existing contractual obligation did not constitute consideration for a new agreement had no application where earlier agreement had been rescinded).

NOTE 21--See *Mostcash plc v Fluor Ltd* [2002] EWCA Civ 975, [2002] BLR 411 (contractual claims in construction dispute barred by compromise).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(iii) Variation/1024. Form of variation.

#### **1024. Form of variation.**

In modern law<sup>1</sup>, a contract made by deed may be varied by written or oral agreement<sup>2</sup>, notwithstanding the parol evidence rule<sup>3</sup>. Similarly, a contract in writing may be varied by an oral agreement<sup>4</sup>. However, by statute certain types of contract must actually be in writing (for instance, the sale or other disposition of an interest in land<sup>5</sup>, or a regulated agreement<sup>6</sup>). In these cases any variation must also be in writing, although a collateral contract may sometimes be made orally<sup>7</sup>.

A contract of guarantee (but not of indemnity)<sup>8</sup> is required to be evidenced in writing<sup>9</sup>. It is well settled that a guarantee cannot be varied by an oral agreement<sup>10</sup>, even if the variation relates only to a part of the contract which, if it stood by itself, would not be required to be evidenced in writing<sup>11</sup>. The foundation on which this rule rests is that, after the agreed variation, the contract of the parties is not the original contract but that contract as varied, of which in its entirety there is no written evidence, so that the contract in its entirety cannot be enforced<sup>12</sup>. The rule does not apply to collateral contracts<sup>13</sup>.

Since a contract required by law to be evidenced in writing may be rescinded by a written or oral agreement<sup>14</sup> it becomes important to distinguish between variation and rescission<sup>15</sup>. If, on its proper construction, the new agreement rescinds the original contract, the latter is brought to an end even though the new agreement is unenforceable<sup>16</sup>. If, on the other hand, the new agreement is only a variation, it can only take effect, if not in writing, as a waiver<sup>17</sup> or by way of estoppel<sup>18</sup>. Whether the parties intended to rescind or vary is to be determined in the light of all the circumstances of the case<sup>19</sup>; but the parties will be presumed to have intended to rescind the old contract and to have substituted a new one wherever the new agreement is inconsistent with the original contract to an extent which goes to the very root of it<sup>20</sup>.

1 At common law the rule was otherwise: see *West v Blakeway* (1841) 2 Man & G 729.

2 This is the equitable rule and now prevails by virtue of the Supreme Court Act 1981 s 49(1): see *Berry v Berry* [1929] 2 KB 316; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 80. Cf para 1018 note 1 ante.

3 See para 690-700 ante.

4 See *Morris v Baron & Co* [1918] AC 1, HL.

5 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and para 624 ante.

6 See the Consumer Credit Act 1974 s 61; and CONSUMER CREDIT vol 9(1) (Reissue) para 160.

7 *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853. As to variation of a regulated agreement by the Consumer Credit Act 1974 s 82 see CONSUMER CREDIT vol 9(1) (Reissue) paras 191, 243.

8 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1052 et seq, 1256.

9 See the Statute of Frauds (1677) s 4 (as amended) (a promise to answer for the debt, default or miscarriage of another). This statute originally applied to many different types of contract; but this is the only provision still remaining: see para 1025 note 17 post. However, it is presumed that the older cases on other parts of the Statute of Frauds (1677) may still be relevant here.

10 *Goss v Lord Nugent* (1833) 5 B & Ad 58; *Harvey v Grabham* (1836) 5 Ad & El 61; *Stowell v Robinson* (1837) 3 Bing NC 928; *Stead v Dawber* (1839) 10 Ad & El 57; *Marshall v Lynn* (1840) 6 M & W 109; *Giraud v*

*Richmond* (1846) 2 CB 835; *Noble v Ward* (1867) LR 2 Exch 135; *Sanderson v Graves* (1875) LR 10 Exch 234; *Plevins v Downing* (1876) 1 CPD 220; *Vezey v Rashleigh* [1904] 1 Ch 634; *Morris v Baron & Co* [1918] AC 1, HL, disapproving *Williams v Moss' Empires Ltd* [1915] 3 KB 242; *Cutts v Taltal Rly Co Ltd* (1918) 62 Sol Jo 423; *Hartley v Hymans* [1920] 3 KB 475; *British and Beningtons Ltd v North Western Cachar Tea Co* [1923] AC 48, HL; *United Dominions Corpn (Jamaica) Ltd v Shoucair* [1969] 1 AC 340, [1968] 2 All ER 904, PC. As to the qualifications of this rule see the text to notes 17-18 infra.

Presumably, if the variation is such that it takes the contract altogether outside that class which is required to be evidenced in writing it is effective and the varied contract is enforceable.

11 *Harvey v Grabham* (1836) 5 Ad & El 61; but the contract may, on its proper construction, be divisible into two or more distinct contracts; cf *Mayfield v Wadsley* (1824) 3 B & C 357; and SALE OF LAND. See also para 627 ante.

12 *Morris v Baron & Co* [1918] AC 1 at 31, HL, per Lord Atkinson.

13 *Ersine v Adeane* (1873) 8 Ch App 756; *De Lassalle v Guildford* [1901] 2 KB 215, CA; *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA; *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853.

14 See para 1018 ante.

15 'The difference between variation and rescission is a real one, and is tested, to my thinking, by this: in the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself': *Morris v Baron & Co* [1918] AC 1 at 25, 26, HL, Lord Dunedin. This must of course be read subject to the clear principle that the second agreement may lack 'contractual force' because of the lack of writing, but will still be effective as a rescission: see note 16 infra.

16 *Morris v Baron & Co* [1918] AC 1, HL.

17 See para 1025 et seq post.

18 See para 1030 et seq post.

19 *Patmore v Colburn* (1834) 1 Cr M & R 65; *Thornhill v Neats* (1860) 8 CBNS 831; *Hunt v South Eastern Rly Co* (1875) 45 LJQB 87, HL; *Sanderson v Graves* (1875) LR 10 Exch 234; *Williams Bros v Ed T Agius Ltd* [1914] AC 510, HL; *Morris v Baron & Co* [1918] AC 1, HL; *Meek v Port of London Authority* [1918] 2 Ch 96, CA; *British and Beningtons Ltd v North Western Cachar Tea Co* [1923] AC 48, HL; *Royal Exchange Assurance v Hope* [1928] Ch 179, CA; *United Dominions Corpn (Jamaica) Ltd v Shoucair* [1969] 1 AC 340, [1968] 2 All ER 904, PC; cf *Marriott v Oxford and District Co-operative Society Ltd (No 2)* [1970] 1 QB 186, [1969] 2 All ER 1126, CA (employer informed employee that due to redundancy he would be re-engaged at a lower rate of pay; employee protested but worked for a time at new rate; not a variation or rescission by agreement, but a wrongful termination by employer for purposes of redundancy payment; see further EMPLOYMENT).

20 *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 at 62, HL, per Lord Atkinson.

See also *Union of India v EB Aaby's Rederi AS* [1975] AC 797, [1974] 2 All ER 874, HL, where the question whether there was a new and independent contract arose in the context of an arbitration clause in the original contract.

## UPDATE

### 1024-1025 Form of variation, In general

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 1024 Form of variation

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(iv) Waiver/1025. In general.

#### **(iv) Waiver**

##### **1025. In general.**

'Waiver' is a vague term used in many senses<sup>1</sup>. It is sometimes used in the sense of an election ('waiver by election'), as where a person decides between two mutually exclusive rights: for instance, where in certain circumstances a plaintiff may waive a claim in tort and bring a restitutionary claim<sup>2</sup>; or where a contract creates alternative liabilities between two different persons<sup>3</sup>; or a contract is made between two parties on the basis of estoppel<sup>4</sup>, or an option right is waived<sup>5</sup>. 'Waiver' is also used to describe the situation where a party prevents performance or announces that he will refuse performance<sup>6</sup>, or loses an equitable right by laches<sup>7</sup>. In the law of contract, 'waiver' sometimes refers to a variation of a contract supported by consideration<sup>8</sup>; or it may refer to the act of an innocent contracting party to affirm the contract after serious breach<sup>9</sup>; or it may describe the election of the innocent party to abandon all rights in respect of a breach of contract<sup>10</sup>. However, in contract it is most commonly used to describe the process whereby one party unequivocally<sup>11</sup>, but without consideration<sup>12</sup>, grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived<sup>13</sup>. A waiver by estoppel or forbearance in this sense is to be distinguished from a variation: a variation is supported by consideration and cannot be retracted unilaterally<sup>14</sup>; but a waiver or forbearance is without consideration and may prima facie be retracted unilaterally<sup>15</sup>.

The validity of a waiver by estoppel or forbearance at common law<sup>16</sup> has been considered in two main contexts: (1) whether certain oral agreements altering the manner of performance of contracts required by the rules originating in the Statute of Frauds (1677) to be evidenced in writing may take effect notwithstanding that oral variations of such contracts are ineffective<sup>17</sup>; (2) whether a party who has waived a particular term of, or claim under, the contract (either at the request of the other or not) may go back on his concession and insist on performance in accordance with the exact terms of the contract<sup>18</sup>.

1 *Ross T Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All ER 60 at 70, HL, per Lord Wright; see also *Banning v Wright (Inspector of Taxes)* [1972] 2 All ER 987 at 1007-1008, [1972] 1 WLR 972 at 990, HL, per Lord Simon; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 397, HL, per Lord Goff of Chieveley.

2 This has been described as the 'abandonment of a right which arises by virtue of a party making an election': *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 398, HL, per Lord Goff of Chieveley. See *Bavins Junior & Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; and *RESTITUTION* vol 40(1) (2007 Reissue) paras 161, 164. The election will be permanent.

3 See para 1066 post.

4 *Sea Calm Shipping Co SA v Chantiers Navals de l'Esterel SA, The Uhenbels* [1986] 2 Lloyd's Rep 294.

5 *Marseille Fret SA v D Oltmann Schiffahrts GmbH & Co KG, The Trado* [1982] 1 Lloyd's Rep 157. As to rights of option see para 640 ante.

6 See para 969 ante.

7 See eg *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 239-240 per Lord Selborne LC; see further *EQUITY*.

8 See eg *Brikom Investments Ltd v Carr*[1979] QB 467 at 488, [1979] 2 All ER 753 at 763, CA, per Roskill LJ, and at 491 and 765 per Cumming-Bruce LJ. As to contractual variations see paras 1019-1024 ante. The election will be permanent.

9 See eg the Sale of Goods Act 1979 s 11(2) (and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 65, 68); *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508, CA (acceptance of late delivery); *Cerealmangimi SpA v Toepfer, The Eurometa*[1981] 3 All ER 533, [1981] 1 Lloyd's Rep 337 (waiver of right to alternative documents in ignorance of the law); *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co, The Manila*[1988] 3 All ER 843 (acceptance of documents). The election will be permanent.

10 This is sometimes described as 'total waiver': see para 1027 post.

11 *Ellis v Inner London Education Authority* [1978] Abr para 2999 (employees reinstated subject to a disciplinary tribunal); *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia*[1977] AC 850, [1977] 1 All ER 545, HL (late payment, not unequivocally accepted); *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama, The Mihalios Xilas*[1979] 2 All ER 1044, [1979] 1 WLR 1018, HL (retention of hire rent insufficiently unequivocal).

12 As to consideration see para 727 et seq ante.

13 'Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the appellant in breach. Viewed from another aspect the same right is conferred by the term of the contract which has been broken by the appellant. When a contract is broken the injured party, in condoning the fault, may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy for the breach. I cannot construe 'waiver' as only applicable to the total abandonment of any term in the lease both as regards ascertained and past breaches, and as regards unascertained or future breaches. I am equally unable to regard a compromise forgiving a past default as the same thing as a consent licensing in advance conduct for which a prior licence is required by the terms of the contract': *Banning v Wright (Inspector of Taxes)*[1972] 2 All ER 987 at 999, [1972] 1 WLR 972 at 980, HL, per Lord Hailsham of St Marylebone LC discussing waiver in a revenue statute.

14 See para 1022 ante.

15 See para 1027 post.

16 Quaere whether this is a separate species of common law estoppel, or whether it is an application of the principle of equitable estoppel (see para 1030 et seq post) enunciated by Lord Cairns LC in *Hughes v Metropolitan Rly Co*(1877) 2 App Cas 439 at 448, HL. See further para 1030 post.

17 Of the original long list of types of contract of which the Statute of Frauds (1677) required written evidence the only remaining example is a contract of guarantee: see s 4 (as amended); paras 1024 ante, 1026 post; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1052 et seq.

18 See para 1027 post.

## UPDATE

### 1024-1025 Form of variation, In general

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 1025 In general

NOTE 13--See *Westbrook Resources Ltd v Globe Metallurgical Inc* [2009] EWCA Civ 310, [2009] 2 All ER (Comm) 1060.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(iv) Waiver/1026. Waiver of terms in contracts of guarantee.

### **1026. Waiver of terms in contracts of guarantee.**

An oral variation of a contract required by law to be evidenced in writing under the Statute of Frauds (1677)<sup>1</sup> is ineffective<sup>2</sup>; but, if what occurs is a mere waiver or forbearance to insist on the strict terms of the written contract, evidence of this may be given<sup>3</sup> notwithstanding that it is not in writing<sup>4</sup>. In determining whether a course of conduct involves a variation, or a mere waiver or forbearance, it is immaterial whether the request comes from one side or the other, or whether it is a matter which is convenient to one party or both<sup>5</sup>; what is material is whether or not the parties intend to affect their existing relations as a matter of contract, for if they do there can only be a variation<sup>6</sup>. It has been said that where the modification of the original contract involves such changes in the contractual obligations of the parties that its structure is clearly affected, the change goes beyond any question of waiver and must be regarded as a variation<sup>7</sup>.

1 As to the contracts required to be evidenced in writing see para 623 ante. Contra contracts of indemnity: see para 1024 text and note 8 ante. Whilst all the other types of contract previously within the rule have been removed from it (see para 1025 note 17 ante), it is presumed that the older cases on other parts of the Statute of Frauds (1677) are still relevant here.

2 See para 1024 ante.

3 Whether such a waiver is actually binding depends on the principles discussed in para 1027 post.

4 *Ogle v Earl Vane* (1868) LR 3 QB 272; *Leather-Cloth Co v Hieronimus* (1875) LR 10 QB 140; *Hickman v Haynes* (1875) LR 10 CP 598; *Morris v Baron & Co* [1918] AC 1, HL; *Levey & Co v Goldberg* [1922] 1 KB 688; *Besseler Waechter Glover & Co v South Derwent Coal Co Ltd* [1938] 1 KB 408, [1937] 4 All ER 552. All these cases in fact concerned the Sale of Goods Act 1893 s 4 (repealed).

5 *Besseler Waechter Glover & Co v South Derwent Coal Co Ltd* [1938] 1 KB 408 at 417, [1937] 4 All ER 552 at 556 per Goddard J. Apart from the requirement of writing, a variation of convenience to both parties would be effective since there would be consideration: see para 1023 ante.

6 For cases where there has been held to be a variation rather than a waiver see *Stowell v Robinson* (1837) 3 Bing NC 928; *Stead v Dawber* (1839) 10 Ad & El 57; *Marshall v Lynn* (1840) 6 M & W 109; *Noble v Ward* (1867) LR 2 Exch 135, Ex Ch; *Plevins v Downing* (1876) 1 CPD 220; *Hartley v Hymans* [1920] 3 KB 475; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA (not a case on requirement of writing). For cases where there has been held to be a waiver rather than a variation see note 4 supra.

7 *Watson v Healy Lands Ltd* [1965] NZLR 511 at 513, obiter per Woodhouse J.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(iv) Waiver/1027. Binding effect of waiver.

### **1027. Binding effect of waiver.**

A concession granted by one party (B) to the contract to the other (A) before breach and supported by consideration or in the form of a deed will, subject to any requirement of writing<sup>1</sup>, constitute an effective variation<sup>2</sup>. A similar concession after breach constitutes an accord and satisfaction<sup>3</sup> or release<sup>4</sup>.

Nevertheless, where the concession lacks the support of consideration or a deed, it may still have an effect as a waiver by estoppel or forbearance of the obligations under the contract<sup>5</sup>, provided that B's waiver is unequivocal<sup>6</sup> and A has acted upon it<sup>7</sup>. The effect is as follows. Normally, the party for whose benefit the waiver was made (A) cannot refuse to accept the performance as agreed to in the waiver<sup>8</sup>. Thus if a buyer (A) of goods requests the seller (B) to extend the time for acceptance A cannot, when the goods are delivered at the later date, refuse to accept them on the ground that they were not delivered in accordance with the strict terms of the contract<sup>9</sup>. On the other hand, if a seller (B) waives the buyer's (A's) obligation to accept delivery within a stipulated time, B may still require A to accept delivery within a reasonable time<sup>10</sup>.

If the party granting the concession (B) has led the other party to believe that he will accept performance at a later date than that originally provided for in the contract B will not be able to refuse that performance when tendered<sup>11</sup>; but if time is of the essence<sup>12</sup> it will remain so as regards the new date<sup>13</sup>. However, if the time of forbearance is not specified in the waiver, B is entitled to impose a reasonable new time limit, which may become of the essence<sup>14</sup>; but, if the new time limit is unreasonable, it only takes effect on expiry of a reasonable time<sup>15</sup>. If B has led the other party to believe that he will accept performance in a different manner from that provided for in the contract he will *prima facie*<sup>16</sup> be entitled to reject the altered performance but he must then give that other party a reasonable time in which to comply with the strict terms of the contract<sup>17</sup>.

Whilst a waiver normally has only a suspensory effect, it may have a permanent effect upon the parties' rights when the original performance becomes impossible<sup>18</sup> or inequitable<sup>19</sup>.

1 For contracts required by law to be evidenced in writing see generally paras 623, 1025 note 17 ante.

2 See para 1023 ante.

3 See para 1043 et seq post. As to the special provisions relating to renunciation of rights under a bill of exchange or promissory note see para 1017 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1555.

4 See para 1052 et seq post.

5 For other meanings of waiver see para 1025 ante. As to the manner in which a waiver is achieved and the matter of consideration see para 1028 post; and as to the relationship of waiver to equitable estoppel see para 1029 post.

6 See para 1025 ante.

7 See para 1028 post.

8 But where a provision is inserted wholly for the benefit of one party, he may waive it without the consent of the other: *Bennett v Fowler* (1840) 2 Beav 302; *Hawksley v Outram* [1892] 3 Ch 359, CA; *Morrell v Studd and Millington* [1913] 2 Ch 648; and see para 962 text and note 16 ante.

- 9 *Hickman v Haynes* (1875) LR 10 CP 598; *Levey & Co v Goldberg* [1922] 1 KB 688; and see *Ogle v Earl Vane* (1868) LR 3 QB 272 (buyer granting concession at seller's request; seller failing to fulfil terms of concession; buyer entitled to buy elsewhere and have his damages assessed as at end of concession period).
- 10 *Tyers v Rosedale Ferryhill Iron Co* (1875) LR 10 Exch 195, Ex Ch.
- 11 *Leather-Cloth Co v Hieronimus* (1875) LR 10 QB 140; *Tyers v Rosedale and Ferryhill Iron Co* (1875) LR 10 Exch 195, Ex Ch; *Bruner v Moore* [1904] 1 Ch 305; *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, CA; *Hartley v Hymans* [1920] 3 KB 475; *Besseler Waechter Glover & Co v South Derwent Coal Co Ltd* [1938] 1 KB 408, sub nom *Bessler Waechter Glover & Co v South Derwent Coal Co Ltd* [1937] 4 All ER 552; *Plasticmoda Societa per Azioni v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, CA; *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340.
- 12 See para 932 ante.
- 13 *Luck v White* (1973) 26 P & CR 89; *Buckland v Farmer & Moody* [1978] 3 All ER 929, sub nom *Buckland v Farmar & Moody* [1979] 1 WLR 221, CA; *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep 46, CA.
- 14 *Hartley v Hymans* [1920] 3 KB 475; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA; *Kirby v Cosindit Societa per Azioni* [1969] 1 Lloyd's Rep 75; *Jacobson van den Berg & Co (UK) Ltd v Biba Ltd* (1977) 121 Sol Jo 333, CA; *State Trading Corp of India Ltd v Compagnie Francaise d'Importation et de Distribution* [1983] 2 Lloyd's Rep 679.
- 15 *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 QB 130, [1958] 1 All ER 542 (buyers under fob contract to open credit; failed to do so by due date; sellers requested compliance 'immediately' accordingly there was a waiver of breach of condition during such time after the receipt of new request by the buyers as could reasonably be called immediately but not after that time). See also para 936 ante.
- 16 Unless the circumstances have so changed as to render this impossible (*Leather-Cloth Co v Hieronimus* (1875) LR 10 QB 140); or a condition precedent has been waived (see para 962 ante); or it would be inequitable (see note 19 infra).
- 17 *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, CA; *Tankexpress AS v Compagnie Financière Belge des Petroles SA* [1949] AC 76, [1948] 2 All ER 939, HL; *Plasticmoda Societa per Azioni v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, CA; *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340. It should be noted that all these cases involve a claim by the party granting the concession to rescind by reason of the other party's non-compliance with the strict terms of the contract; it may be, therefore, that upon the proper construction of the waiver the party granting the concession may still claim damages for breach of contract during the period before the reasonable notice of termination of the concession has expired: see *Enrico Furst & Co v WE Fischer Ltd* supra at 350, obiter per Diplock J.
- 18 *Leather-Cloth Co v Hieronimus* (1875) LR 10 QB 140 (goods to be shipped via Ostend; buyer agreed to shipment via Rotterdam; goods lost but buyer held liable for the price); *Lickiss v Milestone Motor Policies at Lloyd's* [1966] 2 All ER 972, [1966] 1 WLR 1334, CA (insurer leading insured to believe that he need not give certain information within time limited by the policy held unable to rely on original time limit); *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388 (seller accepted non-conforming letters of credit); *Mitchell & Jewell Ltd v Canadian Pacific Express Co* (1974) 44 DLR (3d) 603, Alberta SC (insurer waived notice provision for claim). See further INSURANCE; cf also para 1035 text and note 8 post.
- 19 *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep 569 at 576 per Brandon J; *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA; *Bremer Handelsgesellschaft mbH v C Mackprang JR* [1979] 1 Lloyd's Rep 221, CA; and see para 1029 post.



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### 1028. Requirements of waiver.

Waiver may be express<sup>1</sup> or implied from conduct<sup>2</sup>, but in either case it must amount to an unambiguous<sup>3</sup> representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances<sup>4</sup>. Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance on the concession<sup>5</sup>.

It is submitted that the distinction between variation and waiver must be considered according to the context of the dispute. Thus in the context of contracts of guarantee, the distinction turns upon whether the alteration is a major or a minor one<sup>6</sup>; but in the case of other contracts this distinction is irrelevant, for what matters is whether the modification is binding as being supported by consideration or in the form of a deed<sup>7</sup>. In practice, this distinction may be difficult to draw: if it is so supported, any concession, however minor (as with a forbearance to sue<sup>8</sup>) is a variation; whereas, if that forbearance is not intended to amount to consideration, there is only a waiver<sup>9</sup>.

Standard form contracts<sup>10</sup> frequently include provisions to the effect that no waiver or forbearance in enforcing any of the rights of the proferens under a contract shall prejudice the right of the proferens to do so in the future<sup>11</sup>. It would seem that such provisions rely for their efficacy on preventing any such acquiescence amounting to an unequivocal waiver<sup>12</sup>.

1 See *Bruner v Moore* [1904] 1 Ch 305; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA.

2 See eg *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, CA; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL; *Finance for Shipping Ltd v Appledore Shipbuilders Ltd* [1982] Com LR 49, CA. However, where an act has to be done periodically, the fact that a party has in the past not made objection to its being done irregularly, does not necessarily justify the assumption that similar irregularities will be waived in the future: *Cape Asbestos Co Ltd v Lloyds Bank Ltd* [1921] WN 274; *Bird v Hildage* [1948] 1 KB 91, [1947] 2 All ER 7, CA. Cf para 1032 text and note 17 post.

3 *Alfred C Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep 118, CA; *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395; *Bunge SA v Compagnie Européenne de Cereales* [1982] 1 Lloyd's Rep 306; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514, [1997] 2 Lloyd's Rep 386, CA. Cf *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL (case of variation or promissory estoppel). As to promissory estoppel see para 1030 et seq post.

4 *Watson v Healy Lands Ltd* [1965] NZLR 511 at 534 per Woodhouse J; *Earl of Darnley v London, Chatham and Dover Rly Co* (1867) LR 2 HL 43 at 57 per Lord Chelmsford LC; *Auckland Harbour Board v Kaihe* [1962] NZLR 68 at 88 (NZ CA), obiter per Gresson P. See also *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 at 60, CA, per Winn LJ (there must be actual knowledge; constructive notice is not enough to establish waiver in the eyes of the commercial law).

5 *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 623, [1950] 1 All ER 420 at 423, CA, per Denning LJ; *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340 at 350 per Diplock J; *Watson v Healy Lands Ltd* [1965] NZLR 511 at 514 per Woodhouse J; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL; *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA; *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508, CA; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 127, HL, per Lord Salmon; *Bremer Handelsgesellschaft mbH v C Mackprang JR* [1979] 1 Lloyd's Rep 221, CA; *Bremer Handelsgesellschaft mbH v Finagrain Compagnie Commerciale Agricole et Financière SA* [1981] 2 Lloyd's Rep 259 at 263, 266, CA; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep 45, CA; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL.

6 See para 1026 ante.

7 See para 1027 ante.

8 *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA; and see para 741 ante.

9 *Stead v Dawber* (1839) 10 Ad & El 57.

10 See para 771 ante.

11 This is presumably because of the risk that employees may inadvertently grant a waiver by showing indulgence to customers in the performance of contracts.

12 'If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This ... is the proper sense of the term 'acquiescence', and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct': *De Bussche v Alt* (1878) 8 ChD 286 at 314, CA, per Thesiger LJ.

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### 1029. The relationship to promissory (equitable) estoppel.

The original impetus for the development of common law waiver by estoppel appears to have been the desire of the courts to avoid the sometimes unfair working of the old statutory rule that many types of contract were unenforceable unless evidenced in writing<sup>1</sup>. However, that old rule having progressively disappeared<sup>2</sup>, the two doctrines of waiver by estoppel<sup>3</sup> and promissory (equitable) estoppel<sup>4</sup> seem to be becoming gradually more closely inter-twined<sup>5</sup>. Thus the courts seem to be introducing equitable ideas into common law waiver by estoppel<sup>6</sup>. They have sometimes explained waiver cases in terms of promissory estoppel<sup>7</sup> and in some cases seem to be considering the parallel application of both common law and promissory estoppel<sup>8</sup>. Though promissory estoppel has been developed from equitable sources the only difference of substance between it and waiver<sup>9</sup> appears to be the requirement in the former that the representee has acted to his detriment in reliance on the representation, but even this is no longer beyond doubt as a necessary requirement of estoppel<sup>10</sup>.

1 See the Statute of Frauds (1677) s 4 (as amended), s 17 (repealed); and paras 1024-1025 ante.

2 See para 1025 note 17 ante.

3 See para 1027 ante.

4 See para 1030 post.

5 '[T]he time may soon come when the whole sequence of cases based on promissory estoppel since the war, beginning with *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n, may need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that any are to be regarded with suspicion. But as is common with an expanding doctrine they do raise problems of coherent exposition which have never been systematically explored': *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 758, [1972] 2 All ER 271 at 282, HL, per Lord Hailsham of St Marylebone LC.

It may be that there is no essential juridical difference between waiver and variation: *Banning v Wright (Inspector of Taxes)* [1972] 2 All ER 987 at 1008, [1972] 1 WLR 972 at 991, HL, obiter per Lord Simon.

6 See para 1027 text and note 19 ante.

7 *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 623, [1950] 1 All ER 420 at 423, CA, per Denning LJ; explaining *Bruner v Moore* [1904] 1 Ch 305; *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, CA. Indeed, his Lordship has also said that waiver is only an example of the same principle as promissory estoppel: *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 212, [1972] 2 All ER 127 at 139-140, CA, per Lord Denning MR.

8 See eg *Hartley v Hymans* [1920] 3 KB 475; *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA.

9 The requirements of the two doctrines have been stated in virtually identical terms: see eg *Ogilvy v Hope-Davies* [1976] 1 All ER 683 at 688-689 per Graham J; *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508 at 534, CA, per Megaw LJ; *Bremer Handelsgesellschaft mbH v C Mackprang JR* [1979] 1 Lloyd's Rep 221 at 226, CA, per Lord Denning MR; *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395 at 401 per Browne-Wilkinson J; *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA; *Bremer Handelsgesellschaft mbH v Westzucker GmbH* [1981] 1 Lloyd's Rep 207 at 212-213 per Robert Goff J; *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co, The Manila* [1988] 3 All ER 843.

10 See para 1033 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(v) Promissory Estoppel/1030. The High Trees doctrine.

## **(v) Promissory Estoppel**

### **1030. The *High Trees* doctrine.**

Similar to waiver<sup>1</sup> is the doctrine of promissory<sup>2</sup> or equitable<sup>3</sup> estoppel, whereby a party who has represented that he will not insist upon his strict rights under the contract<sup>4</sup> will not be allowed to resile from that position, or will be allowed to do so only upon giving reasonable notice. This principle is derived from a case<sup>5</sup> where a lease was entered into in 1937 in respect of a new block of flats in central London. The tenant experienced difficulty in sub-letting the flats due to war-time conditions and so the parties agreed that, whilst war-time conditions remained, the landlord would accept only half the ground rent. After the war, the landlord successfully claimed the other half of the ground rent in respect of the period after war-time conditions had ceased<sup>6</sup>, but the judge said that, if the landlord had claimed the other half of the rent in respect of the period whilst war-time conditions persisted, he would have failed<sup>7</sup>. This became known as the *High Trees* doctrine and the judge substantially based it on the grounds of estoppel and equity.

It is well settled that the doctrine of common law estoppel only applies to statements of existing facts and not to representations of future intention or promises<sup>8</sup>. However, the *High Trees* doctrine differs from common law estoppel in that: (1) it applies to promises, not representations of fact<sup>9</sup>; (2) it is generally only suspensory in operation<sup>10</sup>; and (3) it is not clear to what extent the representee need have changed his position to his detriment in reliance on the representation<sup>11</sup>. With the above in mind, as regards the common law, the *High Trees* doctrine has more in common with waiver than estoppel<sup>12</sup>.

There is a well established principle of equity that a defaulting tenant may be relieved against forfeiture<sup>13</sup>. Unlike common law waiver, which concentrated on the intention of the party granting the waiver<sup>14</sup>, the equitable principle was more satisfactory in that it was more concerned with the effect of the representation on the representee<sup>15</sup>.

The *High Trees* principle usually arises where there is a contract between A and B, and B subsequently grants to A a concession, not supported by consideration<sup>16</sup>, that he will not enforce a particular provision of their contract<sup>17</sup>. Whilst the principle is not confined to concessions in respect of pre-existing contractual rights<sup>18</sup>, it only applies where there is some contractual relationship between the parties<sup>19</sup>. Where there is the required pre-existing relationship between the parties, it seems that the *High Trees* doctrine cannot be used as a cause of action, but only by way of defence<sup>20</sup>. Within that context, the doctrine requires an unambiguous representation of intention by B<sup>21</sup> and a reliance on that representation by A<sup>22</sup> in circumstances where it is inequitable for B to go back on his concession<sup>23</sup>. Even then, the effect of the concession is usually only temporary<sup>24</sup>. A modern explanation of the doctrine may be in terms of good faith dealings<sup>25</sup>.

The *High Trees* principle may have been too widely stated in some of the cases<sup>26</sup> and its limits are not yet finally settled<sup>27</sup>. However, it should be distinguished from two other types of estoppel: namely proprietary estoppel and estoppel by convention. Proprietary estoppel is restricted to claims by A of an interest in property where he has acted to his detriment<sup>28</sup>; and whereas the *High Trees* doctrine is concerned with the legal effect of a promise made by B, estoppel by convention prevents B denying that a promise has been made, or from disputing its terms<sup>29</sup>.

1 See para 1025 et seq ante. As to promissory estoppel see also ESTOPPEL vol 16(2) (Reissue) para 1082.

2 This description is perhaps the more apt: *Ajayi v RT Briscoe (Nigeria) Ltd*[1964] 3 All ER 556 at 559, [1964] 1 WLR 1326 at 1330, PC. See also *Dean v Bruce*[1952] 1 KB 11 at 14, [1951] 2 All ER 926 at 928, CA, per Denning LJ.

3 This expression is used, and in a somewhat different sense, in the law of real property: see *ER Ives Investment Ltd v High*[1967] 2 QB 379, [1967] 1 All ER 504, CA; and EQUITY.

4 A promise, before the conclusion of a formal contract, not to insist upon a particular term in that contract, may amount to an enforceable collateral contract: see *City and Westminster Properties (1934) Ltd v Mudd*[1959] Ch 129, [1958] 2 All ER 733; and see generally para 807 ante.

5 See *Central London Property Trust Ltd v High Trees House Ltd*[1947] KB 130, [1956] 1 All ER 256n.

6 In respect of the second two quarters of 1945, the war having finished in June 1945. The claim seemingly falls under the principle that payment of a lesser sum does not satisfy a greater: see *Foakes v Beer*(1884) 9 App Cas 605, HL; and see para 1045 post.

7 *Central London Property Trust Ltd v High Trees House Ltd*[1947] KB 130, [1956] 1 All ER 256n. Although the *High Trees* doctrine is often cited, it is, of course, only obiter dictum by a first instance judge.

8 *Jorden v Money* (1854) 5 HL Cas 185. See also *Lyle-Meller v A Lewis & Co (Westminster) Ltd*[1956] 1 All ER 247, [1956] 1 WLR 29, CA; and ESTOPPEL.

The doctrine of Denning J in *Central London Property Trust Ltd v High Trees House Ltd*[1947] KB 130, [1956] 1 All ER 256n looks very like the dissenting judgment of Lord St Leonards in *Jorden v Money* supra in which the House of Lords by a majority decided that the common law principles of estoppel also applied in equity (the case being decided prior to the fusion of law and equity).

9 See para 1032 post.

10 See para 1035 post.

11 See para 1033 post.

12 See para 1025 et seq ante.

13 'It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties': *Hughes v Metropolitan Rly Co*(1877) 2 App Cas 439 at 448, HL, per Lord Cairns LC; and see EQUITY vol 16(2) (Reissue) paras 907, 958.

14 See para 1028 ante.

15 *Hughes v Metropolitan Rly Co*(1877) 2 App Cas 439, HL (negotiations for surrender of lease; understanding between landlord and tenant that, pending negotiations, the existing six months' notice to repair would not be acted upon; negotiations broke down; landlord not allowed to rely, for purposes of forfeiture, on failure to repair within six months from notice); *Birmingham and District Land Co v London and North Western Rly Co*(1888) 40 ChD 268, CA (tenant under building agreement suspended building operations as result of understanding with landlord; building accordingly not completed by time required in building agreement; landlord's successors in title not allowed to take advantage of failure to complete buildings in due time); *Robertson v Minister of Pensions*[1949] 1 KB 227, [1948] 2 All ER 767 (dispute over war pension; claimant forbore to seek further evidence of entitlement when informed that his claim had been accepted); *P v P*[1957] NZLR 854 (defendant refraining from taking proceedings to set aside or vary separation deed). See further the cases cited in para 1033 note 5 post.

16 In this respect, the *High Trees* doctrine is like a common law waiver: see para 1027 ante. Another approach is to reduce the requirements of the doctrine of consideration; for example by accepting a benefit in fact as sufficient consideration: see *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[1991] 1 QB 1, [1990] 1 All ER 512, CA; and para 747 ante.

17 See *Tungsten Electric Co Ltd v Tool Metal Manufacturing Co Ltd* (1950) 69 RPC 108, CA (the pre-war royalty agreement had been suspended under the *High Trees* doctrine until proper notice).

18 *Robertson v Ministry of Pensions*[1949] 1 KB 227, [1948] 2 All ER 767; *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd*[1968] 2 QB 839, [1968] 2 All ER 987; *Maharaj v Chand*[1986] AC 898, [1986] 3 All ER 107, PC; cf *McCathie v McCathie* [1971] NZLR 58, NZ CA.

19 The doctrine has no application, for example, as between a trespasser and a landowner who has forborne to enforce his rights: see *Morris v Tarrant*[1971] 2 QB 143, [1971] 2 All ER 920; but see *Watson v Canada Permanent Trust Co* (1972) 27 DLR (3d) 735, BC (doctrine applied to an offer of an option, unsupported by consideration, but acted upon). As to rights of option see para 640 ante.

20 See para 1031 post.

21 See para 1032 post.

22 See para 1033 post.

23 See para 1034 post.

24 See para 1035 post.

25 See para 613 ante.

26 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*[1955] 2 All ER 657 at 660, [1955] 1 WLR 761 at 764, HL, obiter per Viscount Simonds.

27 *Re Venning* (1947) 63 TLR 394 at 395, CA, per Somervell LJ; *Combe v Combe*[1951] 2 KB 215 at 225, [1951] 1 All ER 767 at 773, CA, per Asquith LJ; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*[1972] AC 741 at 758, [1972] 2 All ER 271 at 282, HL, obiter per Lord Hailsham of St Marylebone LC.

28 See *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Crabb v Arun District Council*[1976] Ch 179, [1975] 3 All ER 865, CA; and ESTOPPEL vol 16(2) (Reissue) paras 1089-1091.

29 See *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*[1982] QB 84, [1981] 3 All ER 577, CA; and ESTOPPEL vol 16(2) (Reissue) para 1065.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(v) Promissory Estoppel/1031. Promissory estoppel: a shield, not a sword.

### 1031. Promissory estoppel: a shield, not a sword.

The *High Trees* principle of promissory estoppel<sup>1</sup>, like estoppel properly so called<sup>2</sup>, does not create new causes of action in the promisee (A) where none existed before<sup>3</sup>. Whilst sometimes doubted or ignored in later dicta<sup>4</sup>, the fundamental reason is that in English law<sup>5</sup> consideration is usually<sup>6</sup> required to create new rights in A<sup>7</sup>, but is not necessarily needed for their modification or discharge<sup>8</sup>.

Thus it has been said that the *High Trees* principle operates as a shield, not as a sword<sup>9</sup>. It may not be true, however, to say that the principle can never operate except as a defence by A, for it seems that it might be a necessary foundation of a claim. Thus if a buyer (A) of goods due for delivery on 1 January agreed<sup>10</sup> at the request of the seller (B) to accept delivery on 2 January instead, A would be liable to be sued for damages for non-acceptance if he refused to take delivery on 2 January<sup>11</sup>. Similarly, A may be able to sue on a contractual right, relying on a representation to prevent B raising a defence of limitation of action<sup>12</sup>.

1 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; and para 1030 ante.

2 See *Low v Bouverie* [1891] 3 Ch 82 at 105, CA, per Bowen LJ; and ESTOPPEL.

3 *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767, CA (husband promised to allow wife £100 per annum as permanent maintenance, but there was no consideration for the agreement; wife's action to enforce the agreement based on the principle of promissory estoppel failed). As to the enforceability of maintenance agreements see generally the Matrimonial Causes Act 1973 s 34; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 697. See also *Re Fickus, Farina v Fickus* [1900] 1 Ch 331 at 334, 335 per Cozens-Hardy J; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549 (affd on other grounds [1961] Ch 105, [1961] 1 All ER 90, CA); *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785 at 796, [1977] 1 WLR 444 at 457 per Croom-Johnson J; *Syros Shipping Co SA v Elaghill Trading Co, The Proodos C* [1981] 3 All ER 189 at 391, [1980] 2 Lloyd's Rep 390; *James v Heim Gallery (London) Ltd* [1980] 2 EGLR 119 at 120, CA, per Buckley LJ; *Brikom Investments Ltd v Seaford* [1981] 2 All ER 783, [1981] 1 WLR 863, CA.

4 See eg *Re Wyvern Developments Ltd* [1974] 2 All ER 535 at 542-543, [1974] 1 WLR 1097 at 1104-1105 per Templeman J; *Evenden v Guildford City Association Football Club Ltd* [1975] QB 917 at 924, [1975] 3 All ER 269 at 273, CA, per Lord Denning MR, and at 926 and 275 per Browne LJ.

5 Contra some overseas jurisdictions: see the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 90 (a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise); *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, HC.

6 Contra proprietary estoppel: see para 1030 ante.

7 See eg *Russell Bros (Paddington) Ltd v John Lelliott Management Ltd* (1991) 11 Const LJ 377; *Gilbert Steel Ltd v University Construction Ltd* (1976) 12 OR (2d) 19, Ont CA. As to the doctrine of consideration see para 727 et seq ante.

8 *Combe v Combe* [1951] 2 KB 215 at 220, [1951] 1 All ER 767 at 770, CA, per Denning LJ.

9 *Combe v Combe* [1951] 2 KB 215 at 224, [1951] 1 All ER 767 at 772, CA, per Birkett LJ; *Lark v Outhwaite* [1991] 2 Lloyd's Rep 132 at 142 per Hirst J; *Hiscox v Outhwaite (No 3)* [1991] 2 Lloyd's Rep 524 at 535 per Evans J; cf *Robertson v Minister of Pensions* [1949] 1 KB 227, [1948] 2 All ER 767 (representee was plaintiff, but the real cause of action was a statutory right).

10     le without the consideration necessary to constitute a binding variation moving from the seller: see para 1023 ante.

11     Cf *Hartley v Hymans* [1920] 3 KB 475. This seems to be primarily a case of waiver, but the same principle should be applicable if the situation is looked at in terms of promissory estoppel, since the two principles overlap to a large extent: see paras 1029-1030 ante. See also *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, [1956] 1 WLR 29, CA.

It has also been suggested that promissory estoppel may give rise to a cause of action where the promisor knows and intends that the promisee will irretrievably alter his position in reliance on the promise: *Re Wyvern Developments Ltd* [1974] 2 All ER 535 at 543, [1974] 1 WLR 1097 at 1104, obiter per Templeman J.

12     See *Nippon Yusen Kaisha v Pacifica Navegacion SA, The Ion* [1980] 2 Lloyd's Rep 245.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(v) Promissory Estoppel/1032. Unambiguous representation of intention.

### 1032. Unambiguous representation of intention.

The basis of the *High Trees* doctrine of promissory estoppel<sup>1</sup> is that one party (A) has been led by the conduct of the other (B) to believe that B's strict rights under the contract will not be enforced<sup>2</sup>. Whatever the position with regard to other types of estoppel may be<sup>3</sup>, an application of the *High Trees* doctrine can only be founded upon a promise by B of future action<sup>4</sup> which is intended to affect the legal relations between A and B<sup>5</sup> and which indicates in a manner which is clear and unambiguous<sup>6</sup> that B will not insist on his strict legal rights<sup>7</sup>. B's representation may be express or implied<sup>8</sup>. For instance, the doctrine was invoked where B knowingly accepted an inferior performance<sup>9</sup>; and also where B, whilst unaware of the defective performance, ought to have discovered it<sup>10</sup>. On the other hand, mere inactivity is usually<sup>11</sup> insufficient to attract the *High Trees* doctrine<sup>12</sup>, as where there is a mere failure to litigate a claim that both parties regarded as hopeless<sup>13</sup>.

Prima facie, the test is objective<sup>14</sup>. Thus where A, who is offered a concession in respect of the terms of the contract and reasonably understands the concession in one way and the party granting the concession (B) reasonably understands it in another way, there is no foundation for the application of the *High Trees* doctrine<sup>15</sup>. Where, however, A understands the concession in the only reasonable manner, but B intended it in a different and possible, though unlikely, sense, the doctrine may apply<sup>16</sup>.

In the case of contracts involving periodic acts of performance the mere fact that B repeatedly indulges A by accepting late performance without complaint does not raise the *High Trees* doctrine against B<sup>17</sup>; any other rule would encourage contracting parties to insist on the very letter of their rights<sup>18</sup>. Similarly, the doctrine is not invoked simply because B has throughout insisted on strict compliance<sup>19</sup>; nor where B has threatened cancellation if A does not perform his promise<sup>20</sup>; nor where B has accepted inferior performance with an express reservation of his rights<sup>21</sup>; nor where B has accepted inferior performance either unwittingly<sup>22</sup>, or whilst continuing to demand full performance<sup>23</sup>; nor where B has remained silent about one defect whilst complaining about others<sup>24</sup>; nor where the parties knowingly carried out the terms of an agreement still subject to contract<sup>25</sup>.

1 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; and para 1030 ante.

2 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439 at 448, HL, per Lord Cairns LC; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19, [1981] 2 Lloyd's Rep 695.

3 See *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 756-757, [1972] 2 All ER 271 at 281-282, HL, per Lord Hailsham of St Marylebone LC, and at 767-768 and 290-291 per Lord Cross of Chelsea, and at 771-772 and 293-294 per Lord Salmon; and see further ESTOPPEL.

4 *James v Heim Gallery (London)* [1980] 2 EGLR 119 at 120, CA, per Buckley LJ; *Collin v Duke of Westminster* [1985] QB 581 at 595, [1985] 1 All ER 463 at 468, CA, per Oliver LJ.

5 *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785, [1977] 1 WLR 444; *Spence v Shell UK Ltd* [1980] 2 EGLR 68 at 73, CA, per Oliver LJ.

6 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL.

- 7 See the cases on waiver: eg *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 126, HL, per Lord Salmon; *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1979] 1 Lloyd's Rep 221, CA.
- 8 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, HL (see para 1030 note 15 ante); *HM 24 Hour Vehicle Recovery v Hall* [1996] 1 CLY 1228, Bolton county court. It may be that the same degree of certainty is required as there would be required for the formation of a contract, as to which see para 667 ante.
- 9 *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL.
- 10 *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1979] 1 Lloyd's Rep 221, CA.
- 11 Except, presumably, where the law imposes a duty to speak out.
- 12 *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch 305 at 315, [1983] 2 All ER 1067 at 1074, CA, per Oliver LJ.
- 13 *Collin v Duke of Westminster* [1985] QB 581, [1985] 1 All ER 463, CA.
- 14 *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 at 126, HL, per Lord Salmon; *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1979] 1 Lloyd's Rep 221, CA.
- 15 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL (buyers of cocoa requested variation of terms in letter of 20 September; sellers replied granting a variation in different terms on 30 September; even if it could be said (which it could not) that the buyers' interpretation of the sellers' letter was as reasonable as that of the sellers, there was not a sufficiently unambiguous representation to invoke the doctrine). The same result was reached on an issue of alleged variation: see para 1023 ante.
- 16 See *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL.
- 17 *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1981] 2 Lloyd's Rep 425 at 431 per Lloyd J; affd without reference to point [1983] QB 529, [1983] 1 All ER 301, CA; affd [1983] 2 AC 694, [1983] 2 All ER 763, HL.
- 18 *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607, 68 DLR (2d) 354, Can SC; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 at 660, [1955] 1 WLR 761 at 764, HL, obiter per Viscount Simonds; cf para 1028 note 2 ante.
- 19 *V Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 499, CA. Even though B also starts to negotiate with A about a replacement contract: *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395.
- 20 *Drexel Burnham Lambert International NV v Mohamed Schaker Salim Abou El Nasr and Etablissement Abou Nasr El Bassatni* [1986] 1 Lloyd's Rep 356.
- 21 *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508, CA. See also *China-Pacific SA v The Food Corp of India, The Winson* [1980] 3 All ER 556, [1980] 2 Lloyd's Rep 213, CA (a 'without prejudice' concession by B's solicitor); revsd on other grounds [1982] AC 939, [1981] 3 All ER 688, HL.
- 22 *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep 57. Contra failure to object to a known defect within a reasonable time: *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, HL (but no waiver, because unauthorised acceptance of under-payment by agent).
- 23 *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama, The Mihalios Xilas* [1979] 2 All ER 1044, [1979] 1 WLR 1018, HL; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep 583.
- 24 *Telfair Shipping Corp v Athos Shipping Co SA, The Athos* [1983] 1 Lloyd's Rep 127 at 135-136, CA, per Kerr LJ.
- 25 *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114, [1987] 2 All ER 387, PC. As to agreements made subject to contract see para 671 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(v) Promissory Estoppel/1033. Reliance on the representation.

### 1033. Reliance on the representation.

A person (A) seeking to take advantage of the *High Trees* doctrine of promissory estoppel<sup>1</sup> must have altered his position in reliance on the representation made by the other party to the contract (B)<sup>2</sup>. So the doctrine has no application where A's conduct was not influenced by B's promise<sup>3</sup>.

Furthermore, from many of the cases<sup>4</sup> it would appear that A must also have altered his position to his detriment<sup>5</sup>. Nevertheless, it has been said that for the defence to succeed no element of detriment is required<sup>6</sup>; and in some of the decided cases it is difficult to see that detriment was in fact suffered<sup>7</sup>. Perhaps the explanation is that the presence or absence of detriment goes to whether it is equitable for B to go back on his promise<sup>8</sup>. Whether the doctrine can be relied upon in cases alleging part payment of a debt is uncertain<sup>9</sup>, for there would appear to be no detriment in paying only part of what is owed<sup>10</sup>.

1 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; and para 1030 ante.

2 *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, [1964] 1 WLR 1326, PC; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL; *P v P* [1957] NZLR 854; *IRC v Morris* [1958] NZLR 1126, NZ CA; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549; affd on other grounds [1961] Ch 105, [1961] 1 All ER 90, CA.

3 *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, [1964] 1 WLR 1326, PC (representee failed to show inability to resume position); *Fontana NV v Mautner* [1980] 1 EGLR 68; *Bremer Handelsgesellschaft mbH v Bunge Corpn* [1983] 1 Lloyd's Rep 476, CA; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep 45, CA; *Ets Soules & Cie v International Trade Development Co Ltd* [1980] 1 Lloyd's Rep 129, CA (A's conduct not prejudiced by B's promise); *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA.

4 Perhaps on the analogy of estoppel: see *Carr v London and North Western Rly Co* (1875) LR 10 CP 307 at 317 per Brett J; and ESTOPPEL.

5 See eg *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, HL (see para 1030 note 15 ante); *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268, CA (see para 1030 note 15 ante); *Robertson v Minister of Pensions* [1949] 1 KB 227, [1948] 2 All ER 767 (see para 1030 note 15 ante); *P v P* [1957] NZLR 854 (defendant refraining from taking proceedings to set aside or vary separation deed). See also *Fontana NV v Mautner* [1980] 1 EGLR 68; *Meng Long Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] AC 511, [1985] 1 All ER 120, PC; *James v Heim Gallery (London) Ltd* [1980] 2 EGLR 119 at 121, CA, per Buckley LJ; *Youell v Bland Welch & Co Ltd, The Superhulls Cover Case (No 2)* [1990] 2 Lloyd's Rep 431 at 454 per Phillips J. Cf *Gee v Finagold* (1955) Times, 14 October (employers not acting to their detriment in paying lower salary to employee); *Fox v Pianoforte Supplies* (1963) 114 L Jo 140, county court (similar case); *United Overseas Bank v Jiwani* [1977] 1 All ER 733, [1976] 1 WLR 964.

6 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 213, [1972] 2 All ER 127 at 140, CA, obiter per Lord Denning MR. A requirement of detriment seems to hark back to consideration, which may be either a benefit to the promisor or a detriment to the promisee. However, for the detriment to the promisee to constitute consideration it must have been incurred at the request of the promisor: see para 728 ante.

7 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n (see para 1030 ante); *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA (purchaser of car body granting extensions of time; the case is commonly regarded as one of waiver, but was also decided on the principle of promissory estoppel); *D & C Builders Ltd v Rees* [1966] 2 QB 617 at 624, [1965] 3 All ER 837 at 841, CA, obiter per Lord Denning MR; cf *Ledingham v Bermejo Estancia Co Ltd* [1947] 1 All ER 749 (concession in respect of interest; company carrying on business in reliance on the concession).

8 *Société Italo-Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19, [1981] 2 Lloyd's Rep 695; and see para 1034 post.

9 See para 1034 post.

10 But the principle may only be of limited importance in this context anyway, because of its suspensory rather than extinguishing effect: see para 1035 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(v) Promissory Estoppel/1034. Whether it is inequitable for the representor to insist on his contractual rights.

**1034. Whether it is inequitable for the representor to insist on his contractual rights.**

Notwithstanding that one party to the contract (B) has made an unambiguous representation to the other (A) that he will not rely on his contractual rights<sup>1</sup> and A has acted in reliance on that representation<sup>2</sup>, the *High Trees* doctrine of promissory estoppel<sup>3</sup> will not necessarily come into operation. There is another requirement of the doctrine, which echoes its origins in equity<sup>4</sup> and may be based on the same ground as alteration of position<sup>5</sup>; that is, the rule that it must also be inequitable for the representor (B) to insist on his strict legal rights under the contract<sup>6</sup>. B will therefore be allowed to return to his strict legal rights if A can be restored to his previous position<sup>7</sup> or if external circumstances can so justify<sup>8</sup>.

This requirement has caused particular difficulty where A owed B a sum of money and B later agreed to accept a lesser sum in full satisfaction. In one case, the debtor (A) was perceived to have ruthlessly exploited a superior financial situation to exact such a promise and it was therefore said to be inequitable to allow him to rely on the *High Trees* doctrine<sup>9</sup>. In this situation, B's promise to accept the lesser sum in full satisfaction does not constitute a binding contract at common law because A gives no consideration<sup>10</sup>, unless it could be said, in reliance on the representation, that the money owed has been spent on something else<sup>11</sup>, or perhaps that actual payment of a lesser sum is a factual benefit<sup>12</sup>. However, rather than require A to rely on the *High Trees* doctrine by way of a defence to B's subsequent claim for the balance, it might be better to find consideration, but allow B to plead economic duress<sup>13</sup>.

1 See para 1032 ante.

2 See para 1033 ante.

3 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; and para 1030 ante.

4 See para 1030 notes 13-15 ante.

5 See para 1033 ante.

6 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 at 660, [1955] 1 WLR 761 at 763-764, HL, per Viscount Simonds; *Southwark London Borough Council v Logan* (1995) 29 HLR 40, (1995) Times, 3 November, CA.

7 *Société Italo-Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19, [1981] 2 Lloyd's Rep 695 (B asserted his strict legal rights only two days after he made the promise). See also *Banner Industrial and Commercial Properties Ltd v Clark Paterson Ltd* [1990] 2 EGLR 139.

8 *Williams v Stern* (1879) 5 QBD 409 (B held a bill of sale on A's furniture for a loan, but indicated to A after the latter's default that he 'would not look to a week'. Only three days later, B seized the furniture when he heard that A's landlord intended to distrain on it for arrears of rent).

9 *D & C Builders Ltd v Rees* [1966] 2 QB 617 at 625, [1965] 3 All ER 837 at 841, CA, per Lord Denning MR (not inequitable to insist on full payment of debt when debtor has, by exploiting his position as defendant, compelled creditor to take part of debt as satisfaction); but see note 10 infra.

10 See *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; *McCathie v McCathie* [1971] NZLR 58 at 73, NZ CA, per Turner J; and see para 1045 post.

11     le on the basis of the analogy with estoppel: see *Carr v London and North Western Rly Co* (1875) LR 10 CP 307 at 317 per Brett J; and ESTOPPEL. See also para 1035 post.

12     *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA; cf *Foakes v Beer* (1884) 9 App Cas 605, HL; and see para 1034 note 7 post.

13     As to economic duress see para 711 ante. Or perhaps unconscionable bargain: see para 716 ante.

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**1035. Promissory estoppel generally has effect of suspending obligation.**

Like waiver<sup>1</sup>, a concession giving rise to the *High Trees* doctrine of promissory estoppel<sup>2</sup> will generally<sup>3</sup> only suspend the strict legal rights of the party granting it (B); and he may revert to these rights for the future upon giving reasonable notice of his intention to the other party (A)<sup>4</sup>. However, he will not then be able to complain that he did not receive his full legal rights whilst the doctrine operated<sup>5</sup>. Where the concession is in respect of an obligation to be performed within a certain time, the representor will, strictly speaking, never be able to revert to the strict contractual date for performance, but he may fix a new, reasonable, time limit<sup>6</sup>. In this very narrow sense, the original obligation may be said to be extinguished. The notice bringing an end to the operation of the doctrine need not be formal<sup>7</sup>.

Exceptionally, a concession taking effect as a promissory estoppel under the doctrine may become permanently binding and extinguish an obligation if it ceases to be possible for the representee to revert to his original position<sup>8</sup>. Accordingly, it is sometimes suggested that the *High Trees* doctrine can never have anything other than a merely suspensory effect in relation to an obligation to pay money, since, short of illegality, performance of a promise to pay money is never impossible in law<sup>9</sup>. This would certainly be consistent with the common law position<sup>10</sup>, unless it is possible to spell out a contract of compromise<sup>11</sup>. However, it would seem that B's concession will also be permanent where it is highly inequitable to allow him to resile from it<sup>12</sup>. It may therefore be that where the creditor (B), by a promise of forbearance, has led the debtor (A) to undertake a new commitment which would make full payment of the debt onerous to him and thereby inequitable, the *High Trees* doctrine will have a permanent effect even though, strictly speaking, impossibility to pay cannot be shown<sup>13</sup>.

1 See para 1027 ante.

2 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; and para 1030 ante.

3 *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268 at 286, CA, per Bowen LJ: 'If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were in before'. Cf *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 213, [1972] 2 All ER 127 at 140, CA, obiter per Lord Denning MR: 'He may on occasion be able to revert to his strict legal rights for the future ...'; and see the judgment of Denning LJ in *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, [1956] 1 WLR 29, CA.

4 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL; *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, [1964] 1 WLR 1326, PC.

5 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL (royalty in respect of material produced whilst the concession continued); *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA (landlord could not claim an annual contribution in respect of the roof repairs for which he represented he would be responsible).

6 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, HL; *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268, CA; *Brickwoods Ltd v Butler and Walters* (1970) 21 P & CR 256, CA; and see para 1033 ante.

7 *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 at 559, [1964] 1 WLR 1326 at 1330, PC, obiter; see also *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL (unsuccessful counterclaim for previous instalments of royalties sufficient notice for reversion to old arrangements in the future).

8 *Birmingham and District Land Co v London and North Western Ry Co* (1888) 40 ChD 268, CA. The estoppel was also final in *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839, [1968] 2 All ER 987, but this was not a case of a concession taking effect on a pre-existing contractual obligation.

9 See para 900 note 1 ante. Cf *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL, where change of position was not considered a defence to the beneficiaries' personal claim in respect of wrongly paid trust moneys. But, granted that other commitments undertaken in reliance on the concession now make it impracticable for that debtor completely to fulfil his obligation, those commitments are hardly likely in practice to subsist for ever in such a way as to make full payment impracticable. However, see note 13 infra.

10 To hold otherwise would involve departing from the clear decision of the House of Lords in *Foakes v Beer* (1884) 9 App Cas 605, though admittedly no point of promissory estoppel was there argued; but cf *Jorden v Money* (1854) 5 HL Cas 185; and see *BR Meadows & Sons v Rockman's General Store Pty Ltd* [1959] VR 68, Vict SC.

11 *Bell v Galynski* [1974] 2 Lloyd's Rep 13, CA; and see para 740 ante.

12 *Nippon Yusen Kaisha v Pacifica Navegacion SA, The Ion* [1980] 2 Lloyd's Rep 245; *Maharaj v Chand* [1986] AC 898, [1986] 3 All ER 107, PC.

13 In *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA (see para 1033 note 7 ante) Winn LJ based his judgment on the lack of consideration (see para 1045 post); Danckwerts LJ agreed but also said that there could be no defence on equitable grounds because of the conduct of the debtor; only Lord Denning MR based his decision solely upon the principle of promissory estoppel, though he held that because of the conduct of the debtor the principle did not apply (see para 1034 note 9 ante). See also *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vi) Novation/1036. Meaning of 'novation'.

## (vi) Novation

### 1036. Meaning of 'novation'.

Novation has been judicially defined as being where there is a contract in existence and some new contract is substituted for it, either between the same parties or different parties, the consideration usually being the discharge of the old contract<sup>1</sup>. However, where the new contract modifies the old contract between the same parties, this has come to be termed a variation<sup>2</sup>; and the expression 'novation' has more recently tended to be used rather for the situation where the acts to be performed under the old contract remain the same, but are to be performed by different parties<sup>3</sup>. Hence, novation requires a subsequent binding contract<sup>4</sup> and the consent of all parties<sup>5</sup>. Where the new party takes over liabilities formerly resting on one of the original parties, it is a question of construction whether he takes them over with or without benefit of time which has run under the statutory rules of limitation<sup>6</sup>.

Novation should be distinguished from assignment. At common law<sup>7</sup> novation was the only known method of assigning a contractual right. In modern law, contractual rights, but not liabilities<sup>8</sup>, may, as a general rule, be transferred by assignment without the consent of the promisor<sup>9</sup>. Novation, however, is an act whereby, with the consent of all parties<sup>10</sup>, a new contract is substituted for an existing contract and the latter discharged<sup>11</sup>.

There would appear to be another distinct line of authority to be distinguished from novation that, where A holds funds for B and is directed by B to pay C, and A so notifies C, C may sue A for the fund in the event of default even though he has given no consideration<sup>12</sup>.

1 *Scarf v Jardine*(1882) 7 App Cas 345 at 351, HL.

2 *Scarf v Jardine*(1882) 7 App Cas 345 at 351, HL, per Lord Selborne LC. This kind of novation which concerns the two original contracting parties only, is considered in para 1024 ante.

3 *European Assurance Society, Re Miller's Case*(1876) 3 ChD 391, CA; *Scarf v Jardine*(1882) 7 App Cas 345, HL; *Re Head (No 2)*[1894] 2 Ch 236, CA; *Chatsworth Investments Ltd v Cussins (Contractors) Ltd*[1969] 1 All ER 143, [1969] 1 WLR 1, CA; and see the examples cited in para 1037 et seq post.

4 See para 1041 post. As to the form of a novation see para 1040 post.

5 See para 1042 post.

6 *Chatsworth Investments Ltd v Cussins (Contractors) Ltd*[1969] 1 All ER 143, [1969] 1 WLR 1, CA. As to limitation see generally LIMITATION PERIODS.

7 But not in equity (see CHOSSES IN ACTION vol 13 (2009) PARA 24 et seq); nor now by statute (see CHOSSES IN ACTION vol 13 (2009) PARA 13 et seq).

8 See para 757 ante.

9 As to assignment of contractual rights in general see para 757 ante; and CHOSSES IN ACTION vol 13 (2009) PARAS 6, 13 et seq.

10 See para 1042 post.

11 See paras 1040-1041 post.

12 See *Shamia v Joory*[1958] 1 QB 448, [1958] 1 All ER 111.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vi) Novation/1037. Examples of novation: circular debts.

### **1037. Examples of novation: circular debts.**

A common form of novation occurs where A is indebted to B, and C is indebted to A, and all three parties mutually agree that C shall become B's debtor in place of A. Certain conditions must be fulfilled, however, in order to enable B to sue C upon such an agreement. These conditions are: (1) that the intermediate debt of A to B should be extinguished<sup>1</sup>; (2) that the same or a larger amount should be due from C to A than from A to B<sup>2</sup>; and (3) that a defined and ascertained liability should be transferred<sup>3</sup>. It is not necessary, however, that that amount should be either ascertained or due at the moment of the agreement to transfer the debt, if it is subsequently ascertained and due before the original debtor has suffered any change of status<sup>4</sup>.

1 *Cuxon v Chadley* (1824) 3 B & C 591; *Liversidge v Broadbent* (1859) 4 H & N 603; *Cochrane v Green* (1860) 9 CBNS 448; *Wharton v Walker* (1825) 4 B & C 163 (following and explaining *Wilson v Coupland* (1821) 5 B & Ald 228); see also *Israel v Douglas* (1789) 1 Hy Bl 239; *Hodgson v Anderson* (1825) 3 B & C 842; *Lacy v M'Neile* (1824) 4 Dow & Ry KB 7.

2 *Fairlie v Denton* (1828) 8 B & C 395; *Crowfoot v Gurney* (1832) 9 Bing 372.

3 See cases cited in note 2 supra.

4 *Crowfoot v Gurney* (1832) 9 Bing 372; *Pooley v Goodwin* (1835) 4 Ad & El 94. The subsequent bankruptcy of the original creditor will not affect the defendant's liability: *Crowfoot v Gurney* supra.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vi) Novation/1038. Examples of novation: service contracts.

### **1038. Examples of novation: service contracts.**

Perhaps the commonest form of novation of service contracts occurs in practice on the retirement of a partner from a partnership<sup>1</sup>. At common law, the principle of novation applies to contracts of service as well as to other contracts, so that an employee or agent who agrees to serve a firm for a period of years and who, on the dissolution and reconstruction of that firm, but before the expiration of such period, agrees to serve the reconstructed firm in place of the dissolved firm, has no right of action against the dissolved firm<sup>2</sup>. However, statutory rules now apply in many employment cases by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 1981<sup>3</sup>. Except where the employee makes an objection<sup>4</sup>, a relevant transfer<sup>5</sup> does not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking<sup>6</sup> or part transferred, but any such contract which would otherwise have been terminated by the transfer has effect after the transfer as if originally made between the person so employed and the transferee<sup>7</sup>.

1 See para 1042 post. As to partnership see generally PARTNERSHIP.

2 *Hobson v Cowley* (1858) 27 LJ Ex 205; and see *Brace v Calder* [1895] 2 QB 253, CA.

3 See the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794 (as amended); and EMPLOYMENT vol 39 (2009) PARA 111 et seq.

4 *Ie* under *ibid* reg 5(4A) (added by the Trade Union Reform and Employment Rights Act 1993 s 33(4)(c)).

5 As to relevant transfers see the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794, regs 2(1), (3) (amended by the Trade Union Reform and Employment Rights Act 1993 s 33(3)); and EMPLOYMENT vol 39 (2009) PARA 111.

6 'Undertaking' includes any trade or business: Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794, reg 2(1) (definition amended by the Trade Union Reform and Employment Rights Act 1993 ss 33(2), 51, Sch 10).

7 See the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794, reg 5 (amended by the Trade Union Reform and Employment Rights Act 1993 s 33(4)); and EMPLOYMENT vol 39 (2009) PARA 114.

## **UPDATE**

### **1038 Examples of novation: service contracts**

TEXT AND NOTES 3-7--SI 1981/1794 replaced: Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246.

NOTE 4--SI 1981/1794 reg 5(4A) now SI 2006/246 reg 4(7).

NOTE 5--As to relevant transfers see now *ibid* reg 3.

TEXT AND NOTES 6, 7--See now *ibid* reg 4.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vi) Novation/1039. Examples of novation: supply of goods.

**1039. Examples of novation: supply of goods.**

Suppose there is a contract to supply goods and the supplier (B) appreciates that the purchaser (A) intends to nominate his company (C) as purchaser. Leaving aside the initial liability of A where the company C was not formed at the time the supply contract was made<sup>1</sup>, A, B and C may subsequently, either expressly or impliedly agree that B and C shall be the parties to the contract of supply: if so, C as purchaser may sue B as supplier<sup>2</sup>; and B as supplier may sue C for damages for failure to pay a promised deposit<sup>3</sup>.

1 As to such pre-incorporation contracts see the Companies Act 1985 s 36C (as substituted).

2 *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645 (C successfully sued B for breach of implied terms on the grounds that the original sale had been novated).

3 *Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475, [1985] 1 WLR 435, CA.

**UPDATE**

**1039 Examples of novation: supply of goods**

NOTE 1--Companies Act 1985 s 36C replaced by Companies Act 2006 s 51: see COMPANIES vol 14 (2009) PARA 66.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vi) Novation/1040. Form of novation.

#### **1040. Form of novation.**

In so far as a new contract by novation may be of a type of which statute requires a particular form or formality to make it effective, it must, of course, comply with that requirement<sup>1</sup>. Otherwise, however, no particular form or formality is necessary to effect a novation. Thus the new promise need not be in writing as being a promise to answer for the debt of another, since the original debt no longer exists<sup>2</sup>. Similarly, where the original contract was in writing, and before it is breached a new oral contract has been entered into in substitution for it, there is nothing to prevent evidence being admitted of the new contract<sup>3</sup>.

1 For the operation of the rule see *Goss v Lord Nugent* (1833) 5 B & Ad 58 (contract for sale of land in writing; novated into new oral contract; latter contract unenforceable as not complying with the Statute of Frauds (1677)); but, even where the second contract is unenforceable, it will be effective to rescind the original contract: *Morris v Baron & Co* [1918] AC 1, HL; and see further para 1018 ante.

The rule will apply whether the statute requires the contract to be in writing (eg for a sale of an interest in land (see para 624 ante) or in other instances (see para 625 ante)) or to be evidenced in writing, as with a contract of guarantee (see paras 1025 note 17, 1026 ante).

2 *Browning v Stallard* (1814) 5 Taunt 450; *Taylor v Hilary* (1835) 1 Cr M & R 741; *Anstey v Marden* (1804) 1 Bos & PNR 124. For the requirement of writing for guarantees see the Statute of Frauds (1677) s 4 (as amended); para 1025 note 17 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1052 et seq.

3 The rule forbidding the admission of extrinsic evidence to add to, vary or contradict a written instrument (see para 690-700 ante) has no application where after the formation of the contract the parties orally agree to vary its terms or rescind it: *Goss v Lord Nugent* (1833) 5 B & Ad 58. For the rule in general see the *Countess of Rutland's Case* (1604) 5 Co Rep 25b; para 690-700 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vi) Novation/1041. Consideration necessary.

**1041. Consideration necessary.**

Since novation involves the formation of a new contract, it is essential that that contract, unless made by deed, should be supported by valuable consideration<sup>1</sup>. Where the contract between the two original parties is executory<sup>2</sup> on both sides, the consideration for the discharge of the obligation as between them lies in the mutual surrender of rights to performance<sup>3</sup> and the consideration for the contract between the remaining original party and the new party lies in the mutual exchange of promises<sup>4</sup>.

1 As to the general principles of consideration see para 727 et seq ante.

2 For the meaning of 'executory' see para 1014 note 1 ante.

3 See further para 1016 ante.

4 As to the position where the original contract is wholly executed on one side see para 1045 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vi) Novation/1042. Consent and intention to novate essential.

#### **1042. Consent and intention to novate essential.**

Since novation involves a new contract, it is essential that the consent of all parties be obtained<sup>1</sup>, and in this necessity for consent lies the essential difference between novation and assignment<sup>2</sup>. It follows that, to novate a debt, the creditor has to agree to release the original debtor and replace him with a new one<sup>3</sup>. Thus no agreement between retiring and new partners made without the consent of the creditor of the retiring partners can of itself relieve the old firm from liability, or prevent the creditor from suing the members of the old firm with whom he contracted<sup>4</sup>. Conversely, if a debtor agrees with a third person that the third person shall pay his debt, a creditor who has been no party to the agreement cannot sue the third person<sup>5</sup>. However, it is established that payment of a debt by a third party effectively discharges the debt even if it is done without the knowledge of the debtor, provided at least that he subsequently ratifies the transaction; and the rule presumably applies equally to part payment of a debt by a third party<sup>6</sup>.

Consent to novation may, however, be inferred from conduct without express words<sup>7</sup>. Thus a company, by registering a transfer of shares, agrees to discharge the contract with the old shareholder and accept the new one in his place<sup>8</sup>; and the consent of a creditor to a transfer of liability from an old to a new firm may be inferred from the fact that he continues to deal with the new firm after notice of the change of partners<sup>9</sup>. Slight acts of recognition of the existence of the new firm which are not incompatible with a determination to continue to look solely to the old firm as responsible for the debt are not, however, sufficient to constitute novation<sup>10</sup>; and the position is similar with regard to the transfer of business between insurance companies<sup>11</sup>.

Consent may also be implied where it appears that a transfer of liability was contemplated by the parties to the original contract as being in accordance with the custom or usages of the particular trade or business<sup>12</sup>.

To effect a novation, not only must there be consent to the substitution of some new obligation for the original one, there must also be intention to effect a novation<sup>13</sup>.

1 *Wilson v Coupland* (1821) 5 B & Ald 228 at 232; *Wharton v Walker* (1825) 6 Dow & Ry KB 288; *Parker v Wise* (1817) 6 M & S 239; *Thomas v Shillibeer* (1836) 1 M & W 124. See also *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645; *Damon Cia Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475, [1985] 1 WLR 435, CA; *Pacific Wash-A-Matic Ltd v RO Booth Holdings Ltd* (1978) 88 DLR (3d) 69, BC.

2 See para 1036 ante.

3 See para 945 ante.

4 *Kirwan v Kirwan* (1834) 2 Cr & M 617; *British Homes Assurance Corp Ltd v Paterson* [1902] 2 Ch 404; and see the Partnership Act 1890 ss 17, 36; and PARTNERSHIP vol 79 (2008) PARA 76 et seq. If, however the creditor elects to look to the new firm for payment, novation is effected and he can no longer treat the old partners as liable: *Scarf v Jardine* (1882) 7 App Cas 345, HL.

5 *Price v Easton* (1833) 4 B & Ad 433. But the creditor may consent to look to the new party in place of the party with whom he originally contracted; and this is binding on him though done after the agreement between the other two parties: *Oldfield v Lowe* (1829) 9 B & C 73.

6 *Kinney & Green v Johns* [1985] 1 EGLR 46.



7 *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 All ER 143, [1969] 1 WLR 1, CA; *Tito v Waddell (No 2)* [1977] Ch 106 at 285-286, [1977] 3 All ER 129 at 277-278 per Megarry V-C.

8 *Re Towns' Drainage and Sewage Utilization Co, Morton's Case* (1873) LR 16 Eq 104.

9 *Bilborough v Holmes* (1876) 5 ChD 255; *Hart v Alexander* (1837) 2 M & W 484 (knowledge is sufficient without direct notice: per Parke B at 489); *Rolfe and the Bank of Australasia v Flower, Salting & Co* (1865) LR 1 PC 27 at 44, 45. But it is otherwise where a new partner is taken into the firm and the creditor shows a clear intention of continuing his business with the old partners alone: see *British Homes Assurance Corp Ltd v Paterson* [1902] 2 Ch 404. Stronger evidence is required to prove consent to a transfer of liability where the creditor relies upon a written instrument: *Re Family Endowment Society* (1870) 5 Ch App 118 at 132 per Lord Hatherley LC. An advertisement in the London Gazette is sufficient notice to persons who had no dealings with the firm before the date of the dissolution or change of partnership (see the Partnership Act 1890 s 36(2); and PARTNERSHIP vol 79 (2008) PARAS 195-196), but is not sufficient notice to those who have had previous dealings unless brought to their knowledge (*Graham v Hope* (1792) Peake 208; *Jenkins v Blizzard* (1816) 1 Stark 418; *Hart v Alexander* (1837) 2 M & W 484).

10 *Re Smith, Knight & Co, ex p Gibson* (1869) 4 Ch App 662; *Harris v Farwell* (1851) 15 Beav 31; and see *Brown v Gordon* (1852) 16 Beav 302; *Aspinall v London and North Western Rly Co* (1853) 11 Hare 325. Where a plaintiff who has contracted with a firm receives notice that a new partner has been taken into the firm but, ignoring the notice, continues to carry on business relating to the contract with the individual or individuals of whom the firm formerly consisted, he cannot make the new partner liable for a fraud committed by the old members of the firm in respect of the contract: *British Homes Assurance Corp Ltd v Paterson* [1902] 2 Ch 404. See also *Craufurd v Cocks* (1851) 6 Exch 287; *Whitehead v Barron* (1839) 2 Mood & R 248 at 250; *Wilsford v Wood* (1794) 1 Esp 181; *Wilson v Bailey, Potter and Lewis* (1840) 9 Dowl 18; cf *Bagel v Miller* [1903] 2 KB 212, DC; *Friend v Young* [1897] 2 Ch 421. See also PARTNERSHIP.

11 The following cases which concern insurance companies illustrate the general law on novation but transfers of long term business carried on by insurance companies are subject to the sanction of the court (see the Insurance Companies Act 1982 s 49 (as substituted), Sch 2C (as added and amended); and INSURANCE vol 25 (2003 Reissue) para 821 et seq): *Re National Provincial Life Assurance Society* (1870) LR 9 Eq 306; *Re Medical Invalid and General Life Assurance Society, Griffith's Case* (1871) 6 Ch App 374; *Re European Assurance Society Arbitration Acts and Wellington Reversionary Annuity and Life Assurance Society, Conquest's Case* (1875) 1 ChD 334, CA; *Re European Assurance Society Arbitration Acts and Industrial and General Life Assurance and Deposit Co, Cocker's Case* (1876) 3 ChD 1, CA (effect of payment of premium to new company); *Re Manchester and London Life Assurance and Loan Association* (1870) 5 Ch App 640; *Re Family Endowment Society* (1870) 5 Ch App 118 (acceptance of receipts from new company); *Re Medical, Invalid and General Life Assurance Society, Spencer's Case* (1871) 6 Ch App 362 (acceptance of bonus from new company); *Re International Life Assurance Society and Hercules Insurance Co, ex p Blood* (1870) LR 9 Eq 316; *Re European Assurance Society, Miller's Case* (1876) 3 ChD 391, CA (indorsement of policy by new company).

12 As, for instance, a custom for a building owner to transfer his liability to pay the quantity surveyor to the builder whose tender is accepted: *North v Bassett* [1892] 1 QB 333; see also *Johnson v Raylton, Dixon & Co* (1881) 7 QBD 438, CA; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

13 *Wilson v Lloyd* (1873) LR 16 Eq 60; *Rouse v Bradford Banking Co* [1894] 2 Ch 32, CA; affd [1894] AC 586, HL; and see *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1146-1147, [1968] 1 WLR 1555 at 1648-1649 per Ungood-Thomas J; *Tito v Waddell (No 2)* [1977] Ch 106 at 288-289, [1977] 3 All ER 129 at 279-280 per Megarry V-C; *Finland Steamship Co Ltd v Felixstowe Dock and Rly Co* [1980] 2 Lloyd's Rep 287; *Chestertons v Barone* [1987] 1 EGLR 15, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vii) Accord and Satisfaction/1043. In general.

## **(vii) Accord and Satisfaction**

### **1043. In general.**

Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration<sup>1</sup>, not being the performance of the obligation itself<sup>2</sup>. The accord is the agreement by which the obligation is *prima facie*<sup>3</sup> discharged<sup>4</sup>: it no longer needs to be in any particular form<sup>5</sup>. The satisfaction is the consideration which makes the agreement operative<sup>6</sup>, and may be executory<sup>7</sup>. There are special rules relating to compositions with creditors<sup>8</sup>, accounts stated<sup>9</sup> and the effect of an accord and satisfaction of joint obligations<sup>10</sup>. Both the accord and the satisfaction should be specially pleaded<sup>11</sup>.

An accord and satisfaction may be distinguished from a release: the former expression is generally used where there is sufficient consideration to support a simple contract<sup>12</sup>, whilst a release is normally made by deed<sup>13</sup>.

1 See *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98, (1975) 119 Sol Jo 527, CA; and para 1045 post.

2 These rules have been applied to the settling of Revenue appeals by agreement (see *R v Inspector of Taxes, ex p Bass Holdings Ltd* [1993] STC 122) and to compromises (see para 1023 ante).

3 The obligation will not be discharged if the accord is ineffective: see para 1047 post.

4 See para 1044 post.

5 See para 1044 post.

6 *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 643-644, CA, per Scrutton LJ.

7 See para 1046 post.

8 See para 1048 post.

9 See paras 1049-1051 post.

10 See para 1085 post.

11 *Flockton v Hall* (1849) 14 QB 380 at 386; RSC Ord 18 r 8(1); CCR Ord 9 r 2.

12 See para 727 et seq ante.

13 See para 1052 et seq post.

## **UPDATE**

### **1043 In general**

TEXT AND NOTES--The scope of a release must be determined by reference to the intention of the parties, and equity may intervene to prevent a party gaining an

unconscionable advantage from a strict interpretation: *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961.

NOTE 11--RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vii) Accord and Satisfaction/1044. The accord.

#### 1044. The accord.

An accord involves an agreement; and the question whether an accord has been arrived at is one of fact, not law<sup>1</sup>, except where the answer to the question depends on the interpretation of documents<sup>2</sup>. Thus when a creditor keeps a cheque which has been sent to him by his debtor in discharge of an amount due which is disputed or unliquidated<sup>3</sup>, it is a question of fact whether the cheque is taken in satisfaction of the debt or merely as a payment on account leaving a balance due<sup>4</sup>. Though an accord must be a voluntary act<sup>5</sup>, it is not necessarily deprived of its effect merely because the creditor comes to the agreement under economic pressure<sup>6</sup>, for there will be many cases where the creditor is compelled by force of circumstances to accept a performance which is in fact<sup>7</sup> of less value than that contracted for<sup>8</sup>.

There may be a valid oral accord, or accord in writing, of a contract made by deed<sup>9</sup>, or a valid oral accord in respect of a contract required by the Statute of Frauds (1677) to be evidenced in writing<sup>10</sup>, unless the transaction is one which is required to be in writing<sup>11</sup>.

1 *Benning v Dove* (1833) 5 C & P 427; *Barclay v Bank of New South Wales* (1880) 5 App Cas 374, PC; *Cutts v Taltal Rly Co Ltd* (1918) 62 Sol Jo 423; *Stour Valley Builders (a firm) v Stuart* (1993) Times, 22 February, CA.

2 *Bunge SA v Kruse* [1977] 1 Lloyd's Rep 492, CA; *Kitchen Design and Advice Ltd v Lea Valley Water Co* [1989] 2 Lloyd's Rep 221. As to the interpretation of written contracts see *Capon v Evans* [1987] CLY 413; and para 772 et seq ante.

3 Part payment of a debt, whether by cheque or in cash, does not normally discharge the debt because there is no consideration: see para 1045 post.

4 *Ackroyd v Smithies* (1885) 54 LT 130 (cheque sent 'to balance account', retained 'on account' and cashed; held, no satisfaction); *Day v McLea* (1889) 22 QBD 610, CA (cheque sent in satisfaction retained 'on account'; held, no satisfaction); *Nathan v Ogdens Ltd* (1905) 94 LT 126, CA (cheque payable to order, having on the back the words 'received from -- this cheque for £ -- being my share of the second and final distribution', ignored by recipient; held, not a satisfaction); *Neuchatel Asphalte Co Ltd v Barnett* [1957] 1 All ER 362, [1957] 1 WLR 356, CA (cheque indorsed 'in full and final settlement of account'; held, no satisfaction); *Ferguson v Davies* [1997] 1 All ER 315, CA (debtor, when sued, sent a cheque for a lesser sum in full satisfaction and also completed a court form of defence and counterclaim admitting liability for the amount sent; held: acceptance of the cheque not an unequivocal accord in respect of the remainder of the claim; nor was it any satisfaction). As to satisfaction see para 1045 post. As to compromises see further para 1023 ante. See also *Stour Valley Builders (a firm) v Stuart* (1993) Times, 22 February, CA; *Budget Rent A Car Ltd v Goodman* [1991] 2 NZLR 715.

As to the question whether the taking of a negotiable instrument amounts to absolute payment, conditional payment or merely the taking of security see para 951 ante.

5 As to the effect of duress on a contract see para 710 ante. See also para 1047 post.

6 See para 1047 post.

7 Wherever the satisfaction might be of more value than the performance contracted for, the agreement will be supported by consideration: see para 1045 post.

8 In *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA, the debtor was considered to have held the creditor to ransom in compelling him to accept payment of a lesser amount than the sum due and both Lord Denning MR (at 625 and at 841) and Danckwerts LJ (at 626 and at 842) spoke of there being no true accord. Both, however, appear to have been speaking in the context of promissory estoppel (see para 1033 ante); and, while it may be that on the facts of that case there was not even a true accord in the sense here considered, this should not be taken so far as to vitiate any agreement under pressure.

9 See the Supreme Court Act 1981 s 49; and see *Steeds v Steeds* (1889) 22 QBD 537, DC.

10 *Lavery v Turley* (1860) 6 H & N 239. See also the Statute of Frauds (1677); and para 623 ante.

11 See paras 624-625 ante.

## **UPDATE**

### **1044 The accord**

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vii) Accord and Satisfaction/1045. The satisfaction: consideration.

#### **1045. The satisfaction: consideration.**

There can be no satisfaction unless the accord is supported by consideration or made by deed<sup>1</sup>. The general principles of consideration are discussed elsewhere<sup>2</sup>; but in the context of accord and satisfaction the courts have evolved the principles applicable to satisfaction of money claims<sup>3</sup>.

As a general rule (the first rule in *Pinnel's case*<sup>4</sup>), payment or promise of payment of part of an undisputed<sup>5</sup> debt does not amount to satisfaction in respect of the rest of the debt<sup>6</sup>, notwithstanding that it may be of considerable practical benefit for the creditor to have a lesser sum in hand<sup>7</sup>. Similarly, a bare agreement by a creditor to accept payment of a debt by instalments is generally not binding upon him<sup>8</sup>. To these general principles, however, there are the following qualifications and exceptions:

- 233 (1) where the claim is not for a liquidated sum, so that the amount due is uncertain, payment<sup>9</sup> of any sum agreed between the parties will operate as a satisfaction<sup>10</sup>. A claim is unliquidated where, even though specified or named as a definite figure, its ascertainment requires investigation beyond mere calculation<sup>11</sup>;
- 234 (2) where any claim is disputed in good faith, payment<sup>12</sup> of any sum agreed between the parties will operate as a satisfaction<sup>13</sup>;
- 235 (3) where a creditor accepts in satisfaction something different in nature from money, under what is generally known as the second rule in *Pinnel's case* he will be unable to claim the balance, for the law does not inquire into the adequacy of consideration<sup>14</sup>. However, payment by cheque of a lesser sum is no different in nature from payment in money for the purposes of this rule, for there is no benefit or legal possibility of benefit to the creditor in the transaction, whether he has accepted the debtor's personal cheque<sup>15</sup>, or one drawn on a third party<sup>16</sup>;
- 236 (4) where the creditor accepts<sup>17</sup> payment<sup>18</sup> of a smaller sum before the due date, under the second rule in *Pinnel's case* there will be consideration to support a satisfaction<sup>19</sup>; and the same may be true where he accepts payment at a place different from that specified in the contract<sup>20</sup>, for this might be more valuable to him<sup>21</sup>;
- 237 (5) where the creditor accepts the promise of payment of a smaller sum from a third party, there will be consideration to support a satisfaction<sup>22</sup>; and the same will be true if the third party, though not binding himself to pay part of the debt, actually does pay part of it<sup>23</sup>. There will, however, be no satisfaction where the third party uses the debtor's money in making the payment and acts as the debtor's agent<sup>24</sup>;
- 238 (6) there are exceptions to the general rule in respect of compositions with creditors<sup>25</sup> and discharge bills of exchange or promissory notes<sup>26</sup>;
- 239 (7) in certain circumstances<sup>27</sup>, the basic rule may be overridden by the doctrine of promissory estoppel, though the implications of that doctrine in relation to part payment of debts have not been fully worked out<sup>28</sup>.

1 Where the agreement is made by deed, it amounts to a release: see para 1052 et seq post.

2 See para 727 et seq ante.

3 Distinguish payment of the full debt either to the creditor (see para 943 ante) or to a third person at his request (see para 944 ante) and sometimes even payment by a third person (see para 945 ante), which amount to discharge by performance of the original contract (see para 921 ante).

4 See *Pinnel's Case* (1602) 5 Co Rep 117a; and note 6 infra.

5 Contra payment of part of a genuinely disputed debt, which may amount to a binding compromise: see para 1023 ante.

6 *Pinnel's Case* (1602) 5 Co Rep 117a, which was in fact an action upon a bond to pay £8 10s, where the debtor paid £5 2s 2d; but the principle had already been accepted in actions based on assumpsit: *Richards v Bartlets* (1584) 1 Leon 19; *Goring v Goring* (1602) Yelv 11; *Cumber v Wane* (1721) 1 Stra 426; *Dutton v Staples* (1730) 1 Barn KB 337; *Fitch v Sutton* (1804) 5 East 230; *Thomas v Heathorn* (1824) 2 B & C 477; *Down v Hatcher* (1839) 10 Ad & El 121; *Overton v Banister* (1844) 8 Jur 906; *Foakes v Beer* (1884) 9 App Cas 605, HL; *Underwood v Underwood* [1894] P 204, CA; *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; *Tiney Engineering Ltd v Amods Knitting Machinery Ltd* [1987] Abr para 408, [1987] CLY 412, CA; *Re Selectmove Ltd* [1995] 2 All ER 531, [1995] 1 WLR 474, CA; *Ferguson v Davies* [1997] 1 All ER 315, CA (cashing the debtor's cheque for an amount of the debt which the debtor did not dispute did not amount to satisfaction in respect of the balance of the debt).

7 This 'bird-in-the-hand' argument was specifically considered, and rejected, by Lord Blackburn in *Foakes v Beer* (1884) 9 App Cas 605, HL. However, it may be that it has been accepted where a service is to be performed rather than money paid: see *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA; and see para 747 ante; cf *Robichaud v Caisse Populaire de Pokemouche Ltée* 69 DLR (4th) 589, Can (immediate receipt of payment and the saving of time, effort and expense are sufficient consideration to make an agreement for part payment enforceable).

8 *McManus v Bark* (1870) LR 5 Exch 65; *Hookham v Mayle* (1906) 22 TLR 241; see also *Foakes v Beer* (1884) 9 App Cas 605, HL (judgment debt; creditor agreeing in formal document not under seal to take payment by instalments and promising not to take any proceedings on the judgment; did not prevent creditor, after whole debt had been paid, from taking proceedings to claim interest on the judgment). As deeds no longer require sealing (see para 616 ante; and DEEDS AND OTHER INSTRUMENTS), the same facts might today amount to a valid accord and satisfaction.

9 Or, if the agreement can be so construed, a promise of payment: see para 1046 post.

10 *Wilkinson v Byers* (1834) 1 Ad & El 106; *Longridge v Dorville* (1821) 5 B & Ald 117; *Atlee v Backhouse* (1838) 3 M & W 633; *Sibree v Tripp* (1846) 15 M & W 23 at 36, obiter per Parke B.

11 See generally *Workman, Clark & Co Ltd v Lloyd Brazileño* [1908] 1 KB 968, CA; and CIVIL PROCEDURE. See also *Paterson v Wellington Free Kindergarten Association Inc* [1966] NZLR 468 at 471 per Barrowclough CJ; on appeal [1966] NZLR 975, NZ CA. Arrears of money payable under an order for permanent maintenance have been held to be liquidated within this rule notwithstanding that the court may remit them: *Underwood v Underwood* [1894] P 204, CA.

12 See note 9 supra.

13 *Cooper v Parker* (1855) 15 CB 822, Ex Ch; *Re Warren, Weedon v Reading* (1884) 53 LJ Ch 1016. As to the validity of a compromise of a disputed claim see further paras 740, 1023 ante.

14 *Pinnel's Case* (1602) 5 Co Rep 117a ('but the gift of a horse, hawk or robe etc in satisfaction is good, for it shall be intended that a horse, hawk or robe etc might be more beneficial to the plaintiff than the money, in respect of some circumstances, or otherwise the plaintiff would not have accepted of it in satisfaction'); and see *Couldery v Bartrum* (1881) 19 ChD 394 at 399, CA, obiter per Jessel MR; and *Foakes v Beer* (1884) 9 App Cas 605, HL. Cf *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555 (circular cheque transactions with no substance of benefit or detriment); *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170 (increase in supplier's performance bond sufficient consideration for promise of buyer to pay a price increase).

15 *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; overruling *Goddard v O'Brien* (1882) 9 QBD 37. The same applies to the debtor's promissory note: *Cumber v Wane* (1721) 1 Stra 426; approved in *D & C Builders Ltd v Rees* supra. The case of *Sibree v Tripp* (1846) 15 M & W 23, Ex Ch must now be regarded as of doubtful authority. There the plaintiff accepted promissory notes for a smaller amount in satisfaction of a debt and this was held binding on him on the ground that the giving of negotiable paper was a thing different in kind from payment of money and *Cumber v Wane* supra was distinguished on the ground that it did not appear that the promissory note given in that case was negotiable. This view ignores the Promissory Notes Act 1704 (repealed) and, furthermore, in view of *D & C Builders Ltd v Rees* supra, it can no longer be said that negotiability makes the payment different in kind. In *D & C Builders Ltd v Rees* supra, Lord Denning MR (at 623

and at 840) distinguished *Sibree v Tripp* supra on the ground that the 'promissory notes were given on a new contract, in substitution for the debt sued for, and not as a conditional payment', but this can hardly stand with the general principle. It may be, however, that *Sibree v Tripp* supra is supportable as a case involving a settlement of a disputed claim: see note 13 supra.

16 *Re C (A Debtor)* [1997] 1 CL 405, CA. But see the text to note 22 infra.

17 In relation to place of payment, it is sometimes said that the alteration must have been at the request of the creditor and this element is mentioned in *Pinnel's Case* (1602) 5 Co Rep 117a. However, if this really were an inflexible rule, it should logically apply equally to tender of a different thing and payment earlier than the due date; and in *Pinnel's Case* supra this element is mentioned in relation to neither of these. The true rule seems to be not so much that the substituted performance should have been made at the request of the creditor, but that it must give rise to some possibility of benefit to him, however slight. Thus in *Vanbergen v St Edmunds Properties Ltd* [1933] 2 KB 223, CA, payment at a different place did not support a satisfaction because it was acceded to solely at the request of the debtor and could have been of no conceivable benefit to the creditor.

18 See note 9 supra.

19 *Anon* (1588) 4 Leon 81; *Pinnel's Case* (1602) 5 Co Rep 117a (action on a bond to pay £8 10s due on November 11; but the court said that, if the debtor amended his pleadings to show that he paid the £5 2s 2d on October 1, he should have judgment).

20 *Pinnel's Case* (1602) 5 Co Rep 117a.

21 *Vanbergen v St Edmunds Properties Ltd* [1933] 2 KB 223, CA; and see note 17 supra.

22 *Kemp v Watt* (1846) 15 M & W 672; *Henderson v Stobart* (1850) 5 Exch 99. (Such a transaction might amount to a novation: see para 1036 et seq ante.) Although in both these cases the third party first made his promise at the time of the discharge of the debtor, that would not seem an essential element, for the consideration seems to lie in the fact that, by acquiring a right of action against the third party, the creditor gets a benefit. Thus, notwithstanding *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA (see note 15 supra), there should be satisfaction where the debtor gives to the creditor a bill of exchange for a smaller sum drawn on and accepted by a third party.

23 *Welby v Drake* (1825) 1 C & P 557; *Cook v Lister* (1863) 13 CBNS 543; *Hirachand Punamchand v Temple* [1911] 2 KB 330, CA; see also *Re Clarke, ex p Debtor v S Aston & Son Ltd* [1967] Ch 1121 at 1136, [1966] 3 All ER 622 at 629-630, DC, obiter per Cross J. The basis of these cases is not entirely clear. In *Hirachand Punamchand v Temple* supra it is suggested that: (1) the creditor could only take the money of the third party on the terms on which it was offered, ie that the debt should be discharged; (2) the creditor would hold any surplus recovered from the actual debtor as trustee for the third party, and in the circumstances it would be impossible to suppose that the third party wished to enforce full payment; (3) it would be an abuse of the process of the court to allow the creditor to sue for the difference. In *Welby v Drake* supra and *Cook v Lister* supra the rule is said to rest upon the fact that it would be a fraud on the third party to allow the creditor to sue the debtor for the difference, but it is clear that fraud is not being used here in its ordinary sense (cf para 814 ante). Nevertheless, once it is accepted that the promise of payment of a lesser amount by a third party may constitute consideration (presumably on the basis that he may be more creditworthy than the debtor), it would seem impossible to deny that actual payment of a lesser sum by a third party, but without a prior promise, discharges the debt (and see para 746 ante).

As to the principle that payment of a debt by a third party must be with the assent or subsequent ratification of the debtor see para 945 ante. There would seem no reason why the same principle should not be applicable to part payment by a third party.

24 See *Nies v Metropolitan Casualty Insurance Co* 317 Pa 545, 177 A 754 (USA 1935); contra *Sigler v Sigler* 98 Kan 524, 158 P 864 (USA, 1916).

25 See para 1048 post.

26 A bill or note may be renounced or waived by the holder: see the Bills of Exchange Act 1882 ss 62, 89; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1555.

27 In particular, only if it were equitable to do so: see *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; *Re Selectmove Ltd* [1995] 2 All ER 531, [1995] 1 WLR 474, CA; and see para 1034 ante.

28 See para 1030 et seq ante, and particularly para 1035 note 13 ante.



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### 1046. Executory satisfaction.

It is clear that whether executory satisfaction is sufficient to discharge the original obligation depends entirely upon the construction of the contract<sup>1</sup>, though in the older cases such satisfaction was never considered sufficient<sup>2</sup>. Thus a creditor may agree to accept as satisfaction the promise<sup>3</sup> of the substituted obligation<sup>4</sup>; or he may agree to accept only the actual performance of the substituted obligation<sup>5</sup>. In the former case, the original obligation will be discharged from the moment of the new agreement<sup>6</sup>; in the latter case, it will not be discharged until the substituted obligation has been performed<sup>7</sup>.

1 *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, CA (settlement of libel action).

2 See the cases discussed in *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 650-655, CA, per Greer LJ; and see note 5 infra. The old view was taken so far as to deny that a tender of the satisfaction discharged the original obligation: *Gabriel v Dresser* (1855) 15 CB 622.

3 Such a promise will itself be enforceable as a contract: *Henderson v Stobart* (1850) 5 Exch 99.

4 *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, CA; *Good v Cheesman* (1831) 2 B & Ad 328 at 335 per Parke B, citing Com Dig, Accord (B: 4); *Cartwright v Cooke* (1832) 3 B & Ad 701 at 703; *Ford v Beech* (1848) 11 QB 852, Ex Ch; *Bradley v Tonge* (1846) 7 LTOS 231; *Sibree v Tripp* (1846) 15 M & W 23; *Evans v Powis* (1847) 1 Exch 601; *Flockton v Hall* (1849) 14 QB 380 (affd sub nom *Hall v Flockton* (1851) 16 QB 1039, Ex Ch); *Crowther v Farrer* (1850) 15 QB 677; *Ruck v Brownrigg* (1850) 2 Ir Jur 142; *Henderson v Stobart* (1850) 5 Exch 99; *Morris v Baron & Co* [1918] AC 1 at 35, HL, per Lord Atkinson; *Elton Cop Dyeing Co Ltd v Robert Broadbent & Son Ltd* (1919) 89 LjKB 186, CA.

5 It may be that there is a presumption in favour of the agreement being construed as requiring an executed satisfaction, since most of the cases concern concessions to debtors and the creditor is unlikely to be satisfied with a mere promise which may lead to further litigation; cf *Morris v Baron & Co* [1918] AC 1 at 35, HL, per Lord Atkinson. Though the following cases are tainted either with the view that a satisfaction must be executed or turn upon points of pleading, it may be that when looked at from the point of view of construction they provide instances where the agreement required an executed satisfaction: *Norris v Aylett* (1809) 2 Camp 329; *Allies v Probyn* (1835) 2 Cr M & R 408; *Wray v Milestone* (1839) 5 M & W 21; *Ford v Earl of Chesterfield* (1854) 19 Beav 428; *Edwards v Hancher* (1875) 1 CPD 111; *Hawkes v Richard Coles & Sons* (1910) 3 BWCC 163, CA; cf *Bayley v Homan* (1837) 3 Bing NC 915; doubted by Greer LJ in *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 652, CA.

6 So there is no right of resort to the original claim (*British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 at 644 per Scrutton LJ, and at 654 per Greer LJ, CA), unless there is an express term to keep the earlier agreement alive: see *Smith v Shirley and Baylis* (1875) 32 LT 234, Ex Ch.

7 *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, CA. 'The rational distinction seems to be, that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there will be no satisfaction without performance': Smith LC (13th Edn) 385.

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#### **1047. Ineffective accord and satisfaction.**

The original cause of action is not discharged if the accord and satisfaction was effected by the fraud of the debtor<sup>1</sup> or if the satisfaction has been rendered nugatory by his act or default<sup>2</sup>. An accord and satisfaction may also be void for mistake<sup>3</sup> or duress<sup>4</sup>; or it may be liable to be set aside in equity<sup>5</sup>, for misrepresentation<sup>6</sup>, undue influence<sup>7</sup>, or as an unconscionable bargain<sup>8</sup>.

1 *Hall v Smallwood* (1795) Peake Add Cas 13; *Hirschfeld v London, Brighton and South Coast Rly Co* (1876) 2 QBD 1; cf *Atherton v Heard* (1844) 3 LTOS 76.

2 *Turner v Browne* (1846) 3 CB 157. Quaere the position where the debtor's promise is regarded as the satisfaction: see para 1046 ante.

3 See eg *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, CA; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, CA. As to mistake rendering a contract void at common law see paras 704 et seq, 894 et seq ante. For the equitable jurisdiction to reopen settled accounts see *Thomas v Hawkes* (1841) 8 M & W 140; and EQUITY.

4 See *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; and see paras 710-711 ante.

5 A compromise of a disputed claim is not invalidated or liable to be set aside when it later appears that the view of one side was substantially correct: *Holmes v Payne* [1930] 2 KB 301; and see *Carlisle v Barker* 57 Ala 267 (USA 1876); *New York Life Insurance Co v Chittenden* 134 Iowa 613, 112 NW 96 (USA 1907). It is otherwise where the compromise covers items not intended to be covered: *Lawton v Campion* (1854) 18 Beav 87 (family arrangement). As to compromises see para 740 ante.

6 See eg *Hirschfeld v London Brighton and South Coast Rly Co* (1876) 2 QBD 1; *Gilbert v Endean* (1878) 9 ChD 259, CA; *Re Roberts* [1905] 1 Ch 704, CA; *Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170, [1967] 2 All ER 282, HL; and see MISREPRESENTATION AND FRAUD.

7 See para 712 ante.

8 See *Arrale v Costain Civil Engineering Ltd* (1975) 119 Sol Jo 527, CA; and para 716 ante.

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#### **1048. Compositions with creditors.**

Although an agreement whereby a creditor accepts part of his debt in satisfaction of the whole does not generally discharge the whole debt<sup>1</sup>, there is an important exception to this rule in relation to compositions with creditors<sup>2</sup>. A composition may arise where there is more than one creditor and an agreement between the debtor and some or all of the creditors whereby the creditors agree with the debtor, and with each other, to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims<sup>3</sup>. Such an agreement is binding on all parties to it (even if not made by deed<sup>4</sup>) and it is easy to see how the agreeing creditors can be bound inter se<sup>5</sup>. However, it is more difficult to explain how this convenient rule can be enforced by the debtor. Sometimes the rule is said to be based on public policy<sup>6</sup>, but in other cases there is said to be consideration supplied by the debtor<sup>7</sup>; a proposition sometimes more difficult to support<sup>8</sup>. Nevertheless, provided the debtor complies with his obligations under the agreement<sup>9</sup>, it will effectively discharge the original debts<sup>10</sup>.

Where one of the debts upon which a creditor receives a dividend was partly guaranteed by a third person, the dividend must be rateably applied so that the surety is pro tanto relieved<sup>11</sup>.

<sup>1</sup> See para 1045 ante.

<sup>2</sup> I.e. agreements by which each creditor agrees to accept part payment in full settlement of his claim. They may amount to transactions at an undervalue or preferences: see the Insolvency Act 1986 ss 339, 340; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 653 et seq.

<sup>3</sup> See *Re Hatton* (1872) 7 Ch App 723 at 726 per Mellish LJ; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY. A creditor may repudiate the composition as against the other creditors if he subsequently discovers that they have subsequently agreed to receive payments in excess of the composition: *Re Milner* (1885) 15 QBD 605, CA.

<sup>4</sup> As to registration where the agreement is made by deed see the Deeds of Arrangement Act 1914 Pt III (ss 5-10) (as amended); para 1067 et seq post; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 866 et seq. Oral agreements are not caught by the Deeds of Arrangement Act 1914: *Hughes v Newton* [1939] 3 All ER 869. As to voluntary arrangements under the Insolvency Act 1986 ss 5(2), 260(2) see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 81 et seq.

<sup>5</sup> *Boothbey v Snowden* (1812) 3 Camp 175.

<sup>6</sup> I.e. that it would be a fraud on the other creditors if the debtor could not resist a claim by one creditor for the balance of his debt: *Steinman v Magnus* (1809) 11 East 390; *Wood v Roberts* (1818) 2 Stark 417; *Cook v Lister* (1863) 13 CBNS 543 at 595 per Wills J. However, this does not explain why all the creditors party to the agreement may not agree to resile from it, though the principle of good faith dealings may do so: see para 613 ante.

<sup>7</sup> *Good v Cheeseman* (1831) 2 B & Ad 328 (debtor also made an assignment of his property for the benefit of his creditors).

<sup>8</sup> *West Yorkshire Darracq Agency Ltd v Coleridge* [1911] 2 KB 326.

<sup>9</sup> As to the effect of default by the compounding debtor see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) paras 214-215.

<sup>10</sup> *Boothbey v Snowden* (1812) 3 Camp 175; *Good v Cheesman* (1831) 2 B & Ad 328; *Evans v Powis* (1847) 1 Exch 601; *Boyd v Hind* (1857) 1 H & N 938, Ex Ch; *Couldery v Bartrum* (1881) 19 ChD 394, CA; *Pfleger v Browne* (1860) 28 Beav 391. Perhaps such arrangements, being sanctioned by long usage, should now simply be regarded as an exception to the general requirement of consideration, on the grounds of convenience, or good faith dealings: see para 613 ante.

11 *Raikes v Todd* (1838) 8 Ad & El 846; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vii) Accord and Satisfaction/1049. Account stated.

### **1049. Account stated.**

The expression 'account stated' pre-supposes an existing legal obligation by A to pay money to B. Where B sues on an account stated, he proceeds on the assumption that A has admitted the debt to be due to him<sup>1</sup>. The term 'account stated' has been used to cover three different situations<sup>2</sup>: (1) evidentiary<sup>3</sup>; (2) real account stated<sup>4</sup>; and (3) agreement to pay<sup>5</sup>.

A claim by one party which is admitted by the other party to be correct is termed an account stated<sup>6</sup>. In this sense it is no more than an admission of a debt out of court; and while it is no doubt cogent evidence against the admitting party, and throws upon him the burden of proving that the debt is not due, it may, like any other admission, be shown to have been made in error. Where the transaction is of this character, the agreement is without consideration and amounts to no more than an admission<sup>7</sup>.

'Real account stated'<sup>8</sup> is where general items of claim<sup>9</sup> between the parties are brought into account on either side, the figures on both sides are adjusted between the parties and a balance between them is struck<sup>10</sup>. The result is then the same as if each item had been paid and a discharge given for each, and in consideration of that discharge the balance is agreed to be due. The consideration for the payment of the balance is the discharge of the items on each side<sup>11</sup>. It is in connection with an account stated of this character that the equitable doctrine of 'settled accounts' has to be considered<sup>12</sup>.

There is also an account stated where a claim has been made by B, and A has for valuable consideration agreed to accept it as correct<sup>13</sup>. The consideration may be a reduction of the claim, a consent to wait for payment, or any other matter involving a consideration for the agreement to pay<sup>14</sup>. This is a real agreed account and, according to English law, it cannot be reopened except for fraud or on some other ground which would enable a party to an agreement to have it set aside<sup>15</sup>.

It appears that in former times an account stated was used in some cases to evade the rule that an executory satisfaction could not discharge a prior obligation, but that rule has now been discarded<sup>16</sup>. Consequently, it seems clear that the categories in head (2) and head (3) above therefore properly belong to the field of contract rather than restitution, and should perhaps better be regarded as being similar to accord and satisfaction<sup>17</sup>. On the other hand, the category in head (1) above is merely an admission, which raises a rule of evidence<sup>18</sup>.

1 Account stated developed from the old remedy of *insimul computassent* where the plaintiff and the defendant, after a series of mutual dealings, agreed to make up their accounts and to set one item against the other so that there remained only liability for the balance (see eg *Milward v Ingram* (1675) 2 Mod Rep 43; and also *Lemere v Elliott* (1861) 6 H & N 656). The action was later extended to cover cases of admission by the defendant to the plaintiff of a single item; this extension was probably first made in cases where the original debt was unenforceable for some reason: see eg *Knowles v Michel* (1811) 13 East 249.

As to accounts stated in respect of unenforceable, void or illegal debts see para 1051 post.

2 See *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143, HL, per Viscount Cave (approved in *Siqueira v Noronha* [1934] AC 332 at 337, PC). In *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* supra, Viscount Cave in fact dissented on the facts of the case, but his propositions seem to find support in the other judgments: see at 137 per Viscount Haldane, at 141 per Viscount Finlay, at 145 per Lord Shaw of Dunfermline, and at 146 per Lord Phillimore.

3 See the text and notes 6-7 infra.

4 See the text and notes 8-12 *infra*.

5 See the text and notes 13-15 *infra*.

6 See eg *Gretton v Mees* (1878) 7 ChD 839; *Perry v Attwood* (1856) 6 E & B 691.

7 *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143, HL. As to admissions see generally CIVIL PROCEDURE.

8 See eg *Siqueira v Noronha* [1934] AC 332, PC. See also *Laycock v Pickles* (1863) 4 B & S 497; *Wray v Milestone* (1839) 5 M & W 21; *Foster v Allanson* (1788) 2 Term Rep 479.

9 Normally, this requires legal obligations between the parties (see para 1050 *post*); but an unenforceable obligation will be sufficient (see para 1051 *post*).

10 See *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143, HL. 'There is a real account stated, called in old law an *insimul computassent*, that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be debts *in praesenti*, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had been really paid down on each side; and the balance is recoverable as if money had been really taken in satisfaction; subject to this, that where some of the items are such that, if they had been actually paid, the party paying them would have been able to recover them back as on a failure of consideration, the account stated would be invalidated': *Laycock v Pickles* (1863) 4 B & S 497 at 506 per Blackburn J.

11 *Laycock v Pickles* (1863) 4 B & S 497 at 506 per Blackburn J. Where, however, all items in the account are liquidated and undisputed so that the settlement of the account is a mere matter of arithmetical calculation, it is not possible, by treating the transaction as an account stated, to evade the rule that part payment of a debt is not a valid discharge of the whole (as to which see para 1045 *ante*): Corbin *Contract* (1963) para 1314. Similarly, a debtor's promise to pay a larger sum than is in fact due on the account would be unenforceable as to the excess by reason of its being unsupported by consideration.

12 *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143, HL (ship repairers releasing ship to owners without exercising their lien for the cost of repairs). As to good faith dealings see para 613 *ante*.

13 See *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143, HL. See also *Irving v Veitch* (1837) 3 M & W 90.

14 As to consideration see para 727 *et seq ante*.

15 See para 1049 *ante*.

16 See para 1046 *ante*. Thus in *Laycock v Pickles* (1863) 4 B & S 497, P owed D £111, secured by an equitable mortgage on P's land. P rendered joint services to D, for which P claimed £67. The parties mutually valued P's equity in the land at £70 and agreed that this should be transferred to D, that the debt of £111 should be settled, and that D should pay a balance of £26 to P. The balance was later reduced to £22 by agreement. Nowadays, there seems no reason why such a transaction should not be regarded as a valid accord and satisfaction or a contract of compromise, supported by consideration. As to compromises see para 740 *ante*.

17 Jackson *History of Quasi-contract in English Law* (1936) p 110. As to accord and satisfaction see para 1043 *et seq ante*.

18 As to admissions see CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vii) Accord and Satisfaction/1050. Legal obligation necessary.

### **1050. Legal obligation necessary.**

In order to maintain an action on an account stated there must be a debt due to the plaintiff<sup>1</sup>. An admission founded on the mistaken belief that a debt is due does not enable the action to be brought<sup>2</sup>, and an acknowledgment that a sum is due in respect of what is proved to be only a moral obligation for which there has been no valuable consideration will probably not avail<sup>3</sup>.

As a general rule an account stated must refer to past transactions, but it is not strictly necessary that at the time when the account is stated the contract in respect of which the account arises should be wholly executed, provided it is treated as executed; for example the account may include the price at which one party has agreed to sell land to the other, if such price is treated as one of the items and the balance supposes it to have been actually paid<sup>4</sup>. The account must, however, have reference to past transactions, so that where the assignees of an insolvent tenant agreed to pay the landlord a sum of money by way of rent it was held that this form of action would not lie, the agreement being a special agreement upon a separate contract, having no reference to transactions which had gone before<sup>5</sup>.

The mere ascertainment of how much remains due under an original agreement (without any new liability arising or consideration passing) is not necessarily an account stated<sup>6</sup>.

Though the original debt in respect of which an account is stated need not be enforceable at law in order that an action on the account stated should be maintainable<sup>7</sup>, it must be a debt between the plaintiff and the defendant<sup>8</sup>, and a debt due in the same right as that in which the account was stated<sup>9</sup>.

1 *Lemere v Elliott* (1861) 6 H & N 656; *Petch v Lyon* (1846) 9 QB 147; *Burgh v Legge* (1839) 5 M & W 418; *Tucker v Barrow* (1828) 7 B & C 623; *Warwick v Warwick* (1918) 34 TLR 475, CA. An agreement to give a cheque is not sufficient (*Lubbock v Tribe* (1838) 3 M & W 607 at 614); a promise to pay a sum of money as due is only prima facie evidence of the account (*Lubbock v Tribe* supra; *Whitehead v Howard* (1820) 5 Moore CP 105 at 115). Cf *Peacock v Harris* (1808) 10 East 104. As to money paid under a mistake see MISTAKE vol 77 (2010) PARA 69 et seq; RESTITUTION vol 40(1) (2007 Reissue) para 28 et seq.

2 *Gough v Findon* (1851) 7 Exch 48; *Thomas v Hawkes* (1841) 8 M & W 140; and see *Daniell v Sinclair* (1881) 6 App Cas 181, PC.

3 *French v French* (1841) 3 Scott NR 121; *Jones v Tanner* (1827) 7 B & C 542. See, however, *Laycock v Pickles* (1863) 4 B & S 497 at 506, where Blackburn J doubted whether a moral obligation would not be sufficient to support an account stated; and see *Camillo Tank Steamship Co Ltd v Alexandria Engineering Works* (1921) 38 TLR 134 at 143, HL, per Viscount Cave. As to good faith see para 613 ante. As to unenforceable, void or illegal contracts see para 1051 post; and as to the insufficiency of moral obligations as consideration see para 737 ante.

4 *Laycock v Pickles* (1863) 4 B & S 497.

5 *Clarke v Webb* (1834) 1 Cr M & R 29.

6 *Middleditch v Ellis* (1848) 2 Exch 623 at 628. But where in substance there is a new transaction, other matters outside the original agreement being taken into account, or a new consideration passing, such as the dissolution of a partnership, then any balance found due from one party to the other may be the foundation of an account stated: *Foster v Allanson* (1788) 2 Term Rep 479, explained in *Bishun Chand Firm v Seth Girdhari Lal* (1934) 50 TLR 465 at 468, PC.

7 See para 1051 post.

8 *Petch v Lyon* (1846) 9 QB 147 (promise by defendant to pay a debt due from her deceased husband to the deceased husband of plaintiff did not support a count for money due from defendant to plaintiff on an account stated between them). See also *Marshall v Wilson* (1866) 14 WR 699 (defendant promised plaintiff orally that if goods were supplied to a third person he would see plaintiff paid for them; and on the third person making default defendant orally acknowledged his liability to plaintiff for the price of the goods; plaintiff was not entitled to recover as upon an account stated, as the sum acknowledged was not the subject of a direct liability from defendant to plaintiff).

9 *Petch v Lyon* (1846) 9 QB 147; *Green v Davies* (1825) 4 B & C 235 (claim by plaintiff as executrix, on defendant's promise to pay arrears of interest; held: though this was an admission of a debt, yet as it did not appear what was the nature of the debt, nor in what character it was due to plaintiff, nor that it was one for which assumpsit would lie, the claim failed).



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(vii) Accord and Satisfaction/1051. Unenforceable, void or illegal contracts.

### **1051. Unenforceable, void or illegal contracts.**

Where the plaintiff's original claim is unenforceable, he may nevertheless recover on an account stated upon a subsequent admission of liability by the defendant. This will be so where there is a 'real account stated'<sup>1</sup> after the original debt became statute-barred<sup>2</sup>; or where the original claim is unenforceable by reason of the Statute of Frauds (1677)<sup>3</sup>; or where a defendant by stating an account admits the right of the plaintiff to sue in a certain capacity (in which capacity the plaintiff could not have recovered on the original contract) and becomes thereby estopped from denying the plaintiff's right to sue in that capacity on an account so stated<sup>4</sup>; or where the original claim was contracted as a minor<sup>5</sup>.

However, an account stated will not lie if the original debt is void or illegal<sup>6</sup>; this will be so where the original claim is based on an illegal contract<sup>7</sup>, or where the original contract is void either at common law<sup>8</sup> or by statute<sup>9</sup> (for instance a gaming debt<sup>10</sup>). On the other hand, whilst the original claim may be void, it may because of statutory provisions become the basis of a valid account stated<sup>11</sup>. The position in respect of a solicitor who does not deliver a signed bill of costs<sup>12</sup>, or who attempts to sue by way of account stated for the recovery of a gaming debt<sup>13</sup>, is considered elsewhere in this work<sup>14</sup>.

The above rules may be explicable in terms of good faith dealings<sup>15</sup>.

1 For the meaning of 'real account stated' see para 1049 ante.

2 See *Ashby v James* (1843) 11 M & W 542; and LIMITATION PERIODS.

3 See eg *Cocking v Ward* (1845) 1 CB 858 (agreement to pay stated sum for obtaining transfer of lease; liability admitted after transfer); *Seago v Deane* (1828) 4 Bing 459 (agreement by landlord to pay stated sum for repairs, and repairs executed by tenant; liability admitted by landlord); *Teal v Auty* (1820) 2 Brod & Bing 99 (sale of growing crops; admission after severance that sum due, but no specific amount admitted); *Laycock v Pickles* (1863) 4 B & S 497 (agreement for transfer of interest in land in part settlement of debt; account stated when interest transferred).

However, a document which is inadmissible for want of a stamp in one capacity cannot be relied on as proof of an account stated: see the Stamp Act 1891 s 14(4); CIVIL PROCEDURE vol 11 (2009) PARA 959; STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) para 1007.

4 *Peacock v Harris* (1808) 10 East 104; and see generally ESTOPPEL.

5 The Infants Relief Act 1874 s 1 (repealed), which provided that any account stated with an infant was absolutely void, does not apply to contracts made by a minor after 9 June 1987: see the Minors' Contracts Act 1987 s 1(1)(a).

6 Where a contract from its very nature can give rise to no valid claim, a claim upon it cannot be used to found an action upon an account stated: *Joseph Evans & Co Ltd v Heathcote* [1918] 1 KB 418 at 427, CA, per Pickford LJ. As to void and illegal contracts see further para 836 et seq ante.

7 See eg *Rose v Savory* (1835) 2 Bing NC 145.

8 See eg *Kennedy v Broun* (1863) 13 CBNS 677 (claim for barrister's fees).

9 See eg *Re Home and Colonial Insurance Co Ltd* [1930] 1 Ch 102; and see further INSURANCE.

10 See eg *Alberg v Chandler* (1948) 64 TLR 394; *Day v William Hill (Park Lane) Ltd* [1949] 1 KB 632, CA; *Law v Dearnley* [1950] 1 KB 400, [1950] 1 All ER 124, CA; and see LICENSING AND GAMBLING.

11 See *Joseph Evans & Co Ltd v Heathcote* [1918] 1 KB 418, CA.

12 See *Scadding v Eyles* (1846) 9 QB 858.

13 See *R v Weisz, ex p Hector MacDonald Ltd* [1951] 2 KB 611, [1951] 2 All ER 408; and LEGAL PROFESSIONS vol 66 (2009) PARA 747.

14 See generally LEGAL PROFESSIONS.

15 See para 613 ante.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(viii) Release/1052. Meaning of release.

## (viii) Release

### 1052. Meaning of release.

A release is an act of one of the parties to a contract discharging a right of action against the other which arises out of the contract<sup>1</sup>. It may be granted before or after breach<sup>2</sup>. It must be specifically pleaded<sup>3</sup> and may be absolute or conditional<sup>4</sup>; but it may be set aside if obtained by misrepresentation<sup>5</sup>.

A release may take the form either of a deed<sup>6</sup> or of a parol<sup>7</sup> agreement made for valuable consideration<sup>8</sup>; the latter amounts to an accord and satisfaction or rescission and is considered elsewhere<sup>9</sup>. A parol release unsupported by consideration is a mere nudum pactum<sup>10</sup>: it only amounts to an expression of intention not to insist upon the right of action and is no bar either at law<sup>11</sup> or in equity<sup>12</sup>. However, there are several exceptions<sup>13</sup> to the rule that a parol release unsupported by consideration is ineffective: (1) the plaintiff's conduct may be such as to estop him from asserting the continuance of the right<sup>14</sup>; (2) appointment of the debtor as executor of his creditor operates as a release of the debt<sup>15</sup>; (3) the holder of a bill of exchange or promissory note may renounce his rights against the acceptor or any other party by a writing or by delivering up the bill to the acceptor with the intention of discharging his liability<sup>16</sup>; (4) as against a release granted by a bankrupt partner<sup>17</sup>.

1 'The giving or discharging of the right of action which a man hath or may have or claim against another man or that which is his': *Shep Touch* 320. As to a release given by a minor see *Overton v Banister* (1844) 3 Hare 503; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) paras 12, 23. As to releases of executors see *King v Mullins* (1852) 1 Drew 308; and EXECUTORS AND ADMINISTRATORS. As to release of trustees see *Stackhouse v Barnston* (1805) 10 Ves 453; and TRUSTS vol 48 (2007 Reissue) para 925.

2 *Tetley v Wanless* (1867) LR 2 Exch 275 (release after breach); *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53, [1991] 4 All ER 1 (release before breach).

3 RSC Ord 18 r 8(1); CCR Ord 9 r 2.

4 For examples of a conditional release see *Gibbons v Vouillon* (1849) 8 CB 483; *Newington v Levy* (1870) LR 6 CP 180, Ex Ch (condition subsequent avoiding release on non-fulfilment of a compromise); *Hall v Levy* (1875) LR 10 CP 154.

5 *Wild v Williams* (1840) 6 M & W 490; *Hirschfeld v London Brighton and South Coast Rly* (1876) 2 QBD 1; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 785.

6 If the release is by deed, no consideration is necessary: *Preston v Christmas* (1759) 2 Wils 86. A debt of record may be discharged by a deed of release: *Barker v St Quintin* (1844) 12 M & W 441. As to contracts made by deed see para 616 ante.

7 See para 620 ante.

8 Where at the time of release a contract is executory on both sides, this may be done by one party giving up his own rights under the contract: *Foster v Dawber* (1851) 6 Exch 839 at 850. Where the contract is executory on one side only, some further consideration is required: *Wilkinson v Byers* (1834) 1 Ad & El 106; *Steeds v Steeds* (1889) 22 QBD 537, DC. Quære whether good faith dealing will be sufficient (see para 613 ante).

9 As to accord and satisfaction see paras 1043-1051 ante; and as to rescission by agreement see paras 1014-1018 ante. There is no clear distinction of terminology between a release, accord and satisfaction, waiver and promissory estoppel. This section of the title deals principally with a release by deed.

10 *Stamp Duties Comr v Bone*[1977] AC 511, [1976] 2 All ER 354, PC (testator provided in will 'I forgive and release unto ... (existing debts)). As to nudum pactum see para 727 ante.

11 *Pinnel's Case* (1602) 5 Co Rep 117a (see para 1045 ante); *Fitch v Sutton* (1804) 5 East 230; *Harris v Goodwyn* (1841) 2 Man & G 405; *Foster v Dawber*(1851) 6 Exch 839; *De Bussche v Alt*(1878) 8 ChD 286, CA; *Foakes v Beer*(1884) 9 App Cas 605, HL; *West Yorkshire Darracq Agency Ltd v Coleridge*[1911] 2 KB 326.

12 *Stackhouse v Barnston* (1805) 10 Ves 453 at 466 per Grant MR; *Lodge v Dicus* (1820) 3 B & Ald 611; *Cupit v Jackson* (1824) 13 Price 721, Ex Ch; *Tufnell v Constable* (1836) 8 Sim 69 (indorsement on a bond to the effect that the obligee forgave the obligor a portion of the debt); *Harris v Goodwyn* (1841) 2 Man & G 405; *Cross v Sprigg* (1849) 6 Hare 552; *Peace v Hains* (1853) 11 Hare 151; *Jorden v Money* (1854) 5 HL Cas 185; *Re Hancock, Hancock v Berrey* (1888) 57 LJ Ch 793. In *Byrn v Godfrey* (1798) 4 Ves 6, it was held that a declaration by a testator to his executor that he did not mean to call for payment of a promissory note held by him, did not preclude the executor, even in equity, from enforcing payment. See also *IRC v Morris* [1958] NZLR 1126, NZ CA.

13 Another possible exception is a composition with creditors. This may, however, more properly be regarded as an example of accord and satisfaction see para 1048 ante.

14 See paras 1025-1035 ante.

15 See para 1065 post.

16 See the Bills of Exchange Act 1882 ss 62, 89; *Foster v Dawber*(1851) 6 Exch 839. See also para 1017 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1555.

17 See para 1054 post.

## UPDATE

### 1052 Meaning of release

TEXT AND NOTE 3--RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

TEXT AND NOTES 6-8--See *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8; [2001] 1 All ER 961; and PARA 1043.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(viii) Release/1053. Construction of release.

### 1053. Construction of release.

The normal rules as to the construction of written contracts<sup>1</sup> apply to a release. Thus general words of release will be construed with reference to the surrounding circumstances and as being controlled by recitals and context so as to give effect to the object and purpose of the document<sup>2</sup>; but, of course, some words have acquired particular prominence in releases<sup>3</sup>. A release will not be construed as applying to facts of which the grantor had no knowledge at the time when it was given<sup>4</sup>.

A distinction must be drawn between a release and a covenant not to sue<sup>5</sup>, though the distinction is of real importance only in relation to joint obligations<sup>6</sup>. A covenant not to sue, if unlimited as to time and unconditional, is equivalent to a release<sup>7</sup>; but a covenant not to sue for a limited time is not equivalent to a release and at common law provided no answer to a claim on the original contract<sup>8</sup>. In equity, however, effect would be given to such an agreement<sup>9</sup>, and this rule now prevails<sup>10</sup>. Where the distinction has importance<sup>11</sup>, an instrument in the form of a release may be construed as a covenant not to sue in order to give effect to the intention of the parties as appearing from the context and surrounding circumstances<sup>12</sup>.

1 As to the interpretation of written contracts see para 772 et seq ante.

2 *Payler v Homersham* (1815) 4 M & S 423; *Turner v Turner* (1880) 14 ChD 829; *Ramsden v Hylton, Hylton v Biscoe* (1751) 2 Ves Sen 304; *Lampon v Corke* (1822) 5 B & Ald 606; *Boyes v Bluck* (1853) 13 CB 652; *Bisset v Burgess* (1856) 23 Beav 278; *Simons v Johnson* (1832) 3 B & Ad 175; *Lindo v Lindo* (1839) 1 Beav 496; *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182, CA; *Re Joint Stock Trust and Finance Corp'n Ltd* (1912) 56 Sol Jo 272.

3 As to the construction of particular words, such as a release of all 'debts', 'actions', 'contracts', 'claims and demands' see Co Litt 291b; *Hoe's Case* (1592) 5 Co Rep 70b (a release of all demands extinguishes a warranty, but a release of all actions, suits, and quarrels does not release a covenant before breach); *Altham's Case* (1610) 8 Co Rep 150b (release of all demands, suits, actions, quarrels); *Hancock v Field* (1607) Cro Jac 170 (release of all actions, duties and demands); *Tynan v Bridges* (1612) Cro Jac 301 (a release of all demands does not discharge a debt not due); *Thorpe v Thorpe* (1701) 1 Lut 245 (similar case); *Mitton v By* (1618) J Bridg 123 (a release from all demands does not discharge future rent); *Henn v Hanson* (1663) 1 Lev 99 (similar case); *Cutler v Goodwin* (1721) 11 Mod Rep 344 (a release of damages does not include costs); *Ashton v Freestun* (1840) 2 Man & G 1 (release of all actions, causes of action, and suits held not to apply to a bill not accepted at the date of the release); *Haselgrove v House* (1865) LR 1 QB 101 (release of all actions on account of any debts, contracts etc up to the date of the deed); *Tetley v Wanless* (1867) LR 2 Exch 275 (release of all actions and demands held to cover damages and costs in action in which writ was issued at the time of the release). See also DEEDS AND OTHER INSTRUMENTS.

4 *Lyall v Edwards* (1861) 6 H & N 337; *Ecclesiastical Comrs for England v North Eastern Rly Co* (1877) 4 ChD 845; *Re Armitage, ex p Good* (1877) 5 ChD 46, CA; *Re Perkins, Foyser v Beyfus* [1898] 2 Ch 182, CA; *Directors etc of London and South Western Rly Co v Blackmore* (1870) LR 4 HL 610; *Upton v Upton* (1832) 1 Dowl 400.

5 As to covenants not to sue see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 274.

6 See paras 1088-1089 post.

7 *Deux v Jefferies* (1594) Cro Eliz 352; *Ford v Beech* (1848) 11 QB 852, Ex Ch; *Keyes v Elkins* (1864) 5 B & S 240; *Boosey v Wood* (1865) 3 H & C 484.

8 *Ford v Beech* (1848) 11 QB 852, Ex Ch; *Deux v Jefferies* (1594) Cro Eliz 352; *Aloff v Scrimshaw* (1689) 2 Salk 573; *Morley v Frear* (1830) 6 Bing 547; *Thimbleby v Barron* (1838) 3 M & W 210; *Webb v Spicer* (1849) 13 QB 894, Ex Ch; *Lady Foley v Fletcher and Rose* (1858) 3 H & N 769.

9 *Beech v Ford* (1848) 7 Hare 208.

- 10 See the Supreme Court Act 1981 s 49(1).
- 11 See paras 1088-1089 post.
- 12 *Price v Barker* (1855) 4 E & B 760; *Kearsley v Cole* (1846) 16 M & W 128.

## **UPDATE**

### **1053 Construction of release**

NOTE 10--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(5) DISCHARGE BY SUBSEQUENT AGREEMENT/(viii) Release/1054. Bankrupt partner.

**1054. Bankrupt partner.**

Where a member of a partnership is adjudged bankrupt then, subject to any agreement between the partners, the partnership is dissolved as regards all the partners<sup>1</sup>. Moreover, that bankrupt partner need not be joined as a party to any proceedings brought by or against a firm<sup>2</sup>. Where, however, that bankrupt partner has granted a release to a third party with whom the partnership is in litigation from a debt owed by that third party to the partnership, there may be a need to impeach that release before the court, in which case it may be necessary to make the trustee of the bankrupt partner a party to the proceedings<sup>3</sup>.

1 See the Partnership Act 1890 s 33(1); and PARTNERSHIP vol 79 (2008) PARA 177.

2 See the Insolvency Act 1986 s 345(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 677.

3 See *Heilbut v Nevill* (1870) LR 5 CP 478. The Bankruptcy Act 1914 s 117 (repealed) whereby any such release was automatically void is not reproduced in the Insolvency Act 1986 or the Insolvent Partnerships Order 1994, SI 1994/2421 (as amended). See generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY; PARTNERSHIP.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(i) Introduction/1055. In general.

## **(6) DISCHARGE BY SUBSEQUENT EVENT**

### **(i) Introduction**

#### **1055. In general.**

Contractual obligations may be discharged in a number of ways other than by agreement between the parties<sup>1</sup>. Leaving aside discharge by frustration<sup>2</sup>, performance<sup>3</sup>, stipulated event<sup>4</sup> and rescission<sup>5</sup>, contractual obligations may be discharged by: (1) alteration or cancellation of a written contract<sup>6</sup>; (2) merger<sup>7</sup>; (3) insolvency of a contracting party<sup>8</sup>; and (4) other cases<sup>9</sup>.

1 As to discharge by subsequent agreement between the parties see para 1013 et seq ante.

2 As to frustration see para 897 et seq ante.

3 As to performance see para 921 et seq ante.

4 As to stipulated event see para 979 et seq ante.

5 As to rescission see para 986 et seq ante.

6 See paras 1056-1061 post.

7 See paras 1062-1066 post.

8 See paras 1067-1072 post.

9 See paras 1073-1078 post.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(ii) Alteration or Cancellation of Written Contract/1056. Unauthorised material alteration.

## (ii) Alteration or Cancellation of Written Contract

### 1056. Unauthorised material alteration.

If, after a written contract has been executed<sup>1</sup>, a promisee<sup>2</sup> intentionally<sup>3</sup> alters<sup>4</sup> it in a material respect<sup>5</sup> without the consent of the promisor<sup>6</sup>, whether by adding anything to it or by striking out any part of it or otherwise, the promisor is discharged, even if the original words can still be read<sup>7</sup>. The rule applies not only to contracts made by deed, but to all contracts in writing and written instruments<sup>8</sup>.

A party seeking to enforce an altered instrument must show that it is not invalidated by the alteration<sup>9</sup>.

1 As to cancellation of a bond or bill see para 1059 post.

2 As to alteration by another see para 1057 post.

3 Contra where the alteration was made by mistake or accident: see para 1057 post.

4 As to loss or accidental destruction of a written contract see para 1061 post.

5 As to what amounts to a material alteration see para 1058 post; as to the effect of alteration by agreement see paras 1019-1024 ante; and as to the presumption, in the case of a deed, that an alteration was made before execution see para 1019 ante. A bill of exchange is, however, by its very nature alterable without infringing this rule, in that it may be indorsed. As to the different kinds of indorsement see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1492 et seq.

6 Cf *Hudson v Revett* (1829) 5 Bing 368; *Adsetts v Hives* (1863) 33 Beav 52.

7 *Pigot's Case* (1614) 11 Co Rep 26b (as qualified in *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455); *Laird v Robertson* (1791) 4 Bro Parl Cas 488; *Fairlie v Christie* (1817) 7 Taunt 416. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 82.

8 *Master v Miller* (1791) 4 Term Rep 320 (affd (1793) 2 Hy Bl 141, Ex Ch); *Powell v Divett* (1812) 15 East 29; *Croockewit v Fletcher* (1857) 1 H & N 893 (charterparty); *Pattinson v Luckley* (1875) LR 10 Exch 330 (building contract); *Sellin v Price* (1867) LR 2 Exch 189; *Langhorn v Cologan* (1812) 4 Taunt 330. As to alterations of negotiable instruments see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1559 et seq.

9 *Johnson v Duke of Marlborough* (1818) 2 Stark 313; *Bishop v Chambre* (1827) Mood & M 116. For the position where he cannot show that the contract is not invalidated by the alteration: see para 1060 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(ii) Alteration or Cancellation of Written Contract/1057. Scope of rule.

### **1057. Scope of rule.**

Even if the alteration<sup>1</sup> is made by a stranger without the knowledge of the promisee, the other party is discharged if the document is in the custody of the promisee or of his agent<sup>2</sup>; but there is no discharge where the alteration was made by a stranger whilst the document was not in such custody<sup>3</sup>. The promisor is not discharged where the alteration was made by accident<sup>4</sup> or mistake<sup>5</sup>; but the contract is avoided where the alteration was intentional, even if made under a mistake of law as to the legal effect of the document<sup>6</sup>. If the alteration is made by the promisor, or by someone for whose acts he is responsible, the contract is not avoided, but the other party is entitled to enforce it according to its original tenor<sup>7</sup>.

1 See paras 1056 ante, 1058 post.

2 *Davidson v Cooper* (1844) 13 M & W 343, Ex Ch; *Bank of Hindostan, China and Japan Ltd v Smith* (1867) 36 LJCP 241; *Croockewit v Fletcher* (1857) 1 H & N 893; *Pattinson v Luckley* (1875) LR 10 Exch 330; but see *Lowe v Fox* (1887) 12 App Cas 206 at 217, HL, per Lord Herschell.

3 *Henfree v Bromley* (1805) 6 East 309; *Waugh v Bussell* (1814) 5 Taunt 707.

4 *Lady Argoll v Cheney* (1626) Palm 402; *Bolton v Bishop of Carlisle* (1793) 2 Hy Bl 259 at 263; *Hong Kong and Shanghai Bank v Lo Lee Shi* [1928] AC 181, PC.

5 *Raper v Birkbeck* (1812) 15 East 17; *Wilkinson v Johnson* (1824) 3 B & C 428; *Novelli v Rossi* (1831) 2 B & Ad 757; *Prince v Oriental Bank Corp* (1878) 3 App Cas 325, PC.

6 *Bank of Hindostan, China and Japan Ltd v Smith* (1867) 36 LJCP 241.

7 *Pattinson v Luckley* (1875) LR 10 Exch 330.

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### **1058. What alterations material.**

To have the effect of discharging the promisor the alteration must be material<sup>1</sup>, that is to say it must be one which alters the obligations created by the instrument<sup>2</sup>. An alteration which merely expresses what would otherwise be implied is immaterial and does not affect the liability under the contract<sup>3</sup>.

A contract in which there has been a material alteration should be distinguished from a forgery, that is to say a document to which the signature of a person has been added without his authority, for a forgery is absolutely null and void<sup>4</sup>.

1 Whether an alteration is material is a question of law for the court: *Vance v Lowther* (1876) 1 Ex D 176 at 178.

2 *Mollett v Wackerbarth* (1847) 5 CB 181 (addition to sold note of words 'of their own manufacture' held a material alteration); *Powell v Divett* (1812) 15 East 29 (material alteration of sale note by broker, as to allowance for damaged goods); *Eagleton v Gutteridge* (1843) 11 M & W 465 (addition of forename in power of attorney immaterial); *Davidson v Cooper* (1844) 13 M & W 343, Ex Ch (addition of seals to guarantee, thereby making it appear a document under seal, held material); *Enthoven v Hoyle* (1852) 13 CB 373 (insertion of name of payee in debenture after sealing held material); *Croockewit v Fletcher* (1857) 1 H & N 893 (alteration in charterparty of time of sailing of vessel held material); *Re United Kingdom Shipowning Co Ltd, Felgate's Case* (1865) 2 De GJ & Sm 456 (substitution of sheet after execution held material); *Sellin v Price* (1867) LR 2 Exch 189 (addition of schedule to trust deed made between debtor and creditors held material); *Wood v Slack* (1868) LR 3 QB 379 (addition of names of creditors to schedule to trust deed after registration held not a material alteration); *Aldous v Cornwell* (1868) LR 3 QB 573 (addition to promissory note of words 'on demand' held immaterial); *White v Benekendorff* (1873) 29 LT 475 (alteration of date of delivery in bought note held material); *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75 (material alterations in suretyship bond by guarantor, discharging co-sureties); *Re Howgate and Osborne's Contract* [1902] 1 Ch 451 (immaterial alteration of name in mortgage); *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455 (immaterial alteration of date of deed).

3 *Waugh v Bussell* (1814) 5 Taunt 707 (insertion of word omitted); *Sanderson v Symonds* (1819) 1 Brod & Bing 426 (addition of word which did not affect the agreement); *Doe d Waters v Houghton* (1827) 1 Man & Ry KB 208 (addition in lease of the words 'house and premises' after 'farm'); *Trew v Burton* (1833) 1 Cr & M 533 (correction of name); *Wood v Slack* (1868) LR 3 QB 379 (addition of names of creditors in schedule to trust deed); *Cariss v Tattersall* (1841) 2 Man & G 890 ('Pay -- or other' altered to 'Pay -- or order'). See also para 1019 text to note 18 ante; and see further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 158 et seq.

4 See *Governor & Co of Bank of Ireland v Trustees of Evan's Charities in Ireland* (1855) 5 HL Cas 389; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 72. As to material alteration of bills of exchange see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1560.

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### **1059. Cancellation.**

The cancellation of a bond or deed, by or with the consent of the obligee or promisee, and with the intention of cancelling the obligation, discharges the instrument<sup>1</sup>. But a cancellation without the consent of the obligee or promisee, or by mistake or accident, without any intention to discharge the obligation, does not affect the liability of the parties<sup>2</sup>.

Where a material alteration is made to a bill of exchange or promissory note without the assent of all the parties liable on it, the bill or note is usually avoided<sup>3</sup>. An alteration in the number of a Bank of England note is considered material, although it does not vary the contract, because such a note is part of the currency, and the number is a material part of the instrument<sup>4</sup>.

<sup>1</sup> *Seaton v Henson* (1678) 2 Lev 220; *Alsager v Close* (1842) 10 M & W 576; *Bolton v Bishop of Carlisle* (1793) 2 Hy Bl 259 at 264; *Harrison v Owen* (1738) 1 Atk 520; *Gilbert v Wetherell* (1825) 2 Sim & St 254; *Warwick v Rogers* (1843) 5 Man & G 340; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC. See also 3 Preston's Essay on Abstracts of Title (2nd Edn) 103.

<sup>2</sup> *Re Smith, ex p Smith* (1843) 3 Mont D & De G 378; *Raper v Birkbeck* (1812) 15 East 17; *Wilkinson v Johnson* (1824) 3 B & C 428; *Bolton v Bishop of Carlisle* (1793) 2 Hy Bl 259; *Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA; *Novelli v Rossi* (1831) 2 B & Ad 757; *Perrott v Perrott* (1811) 14 East 423.

<sup>3</sup> See the Bills of Exchange Act 1882 ss 64, 89; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1559 et seq.

<sup>4</sup> *Suffell v Bank of England* (1882) 9 QBD 555, CA; *Leeds and County Bank Ltd v Walker* (1883) 11 QBD 84; *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA; *Arab Bank Ltd v Ross* [1952] 2 QB 216, [1952] 1 All ER 709, CA. See further DEEDS AND OTHER INSTRUMENTS.

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### **1060. Effect of alteration or cancellation.**

If the contract is executory<sup>1</sup>, the obligation is discharged altogether by material alteration or cancellation, even if the alteration relates only to one of several distinct covenants<sup>2</sup>; but where the contract has been executed or partly executed, the alteration or cancellation of it will not divest any property or right which has once vested under it<sup>3</sup>. However, a written contract is not discharged by an immaterial alteration<sup>4</sup>.

<sup>1</sup> See para 606 ante.

<sup>2</sup> *Pigot's Case* (1614) 11 Co Rep 26b; *Mollett v Wackerbarth* (1847) 5 CB 181 at 193 per Maule J.

<sup>3</sup> *Bolton v Bishop of Carlisle* (1793) 2 Hy Bl 259 at 263; *Roe d Earl of Berkeley v Archbishop of York* (1805) 6 East 86; *Langhorn v Cologan* (1812) 4 Taunt 330; *Doe d Lewis v Bingham* (1821) 4 B & Ald 672; *Hutchins v Scott* (1837) 2 M & W 809; *West v Steward* (1845) 14 M & W 47; *Agricultural Cattle Insurance Co v Fitzgerald* (1851) 16 QB 432; *Lord Ward v Lumley* (1860) 5 H & N 87; *Green v Attenborough* (1864) 3 H & C 468, Ex Ch; *Pattinson v Luckley* (1875) LR 10 Exch 330.

<sup>4</sup> *Eagleton v Gutteridge* (1843) 11 M & W 465; *Wood v Slack* (1868) LR 3 QB 379; *Aldous v Cornwell* (1868) LR 3 QB 573; *Re Howgate and Osborne's Contract* [1902] 1 Ch 451; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455. See also paras 1058-1059 ante.

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**1061. Loss etc of document.**

The loss or accidental destruction<sup>1</sup> of a written contract does not discharge the parties liable under it, but only affects the mode of proving its contents<sup>2</sup>. Where a bill of exchange or note is lost, the holder has a statutory right to a duplicate<sup>3</sup>.

1 For the related topic of removal or loss of the seal from a deed see *Bamberger v Commercial Credit Mutual Assurance Society* (1855) 15 CB 676; and DEEDS AND OTHER INSTRUMENTS. Most deeds no longer require a seal: see para 616 ante.

2 Thus an action can be brought to enforce a lost bond (see *Atkinson v Leonard* (1791) 3 Bro CC 218; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 132) or a debt on a bill of exchange may be established although the bill is lost (*Pooley v Millard* (1831) 1 Cr & J 411); and a contract may be proved by secondary evidence, as may a will, where the original is lost (see *Read v Price* [1909] 2 KB 724 at 737, CA, per Farwell LJ; citing *Sugden v Lord St Leonards* (1876) 1 PD 154). As to proof by secondary evidence see generally CIVIL PROCEDURE vol 11 (2009) PARA 878 et seq.

3 See the Bills of Exchange Act 1882 ss 69, 89; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1507.

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### (iii) Merger

#### 1062. Merger by higher remedy.

Where a creditor takes from his debtor a security of a higher nature than that which he already possesses for his debt (for instance if he takes a bond or a covenant or recovers judgment<sup>1</sup> in respect of a debt by simple contract), his remedies on the minor security or cause of action are normally merged in the higher remedy by operation of law and are extinguished<sup>2</sup>. Similarly, where parties contract over the sale and purchase of land and subsequently enter into a deed of conveyance to complete it, it is presumed<sup>3</sup> that they intend the contract to be merged in the deed<sup>4</sup>. However, if the parties so intend, a deed or bond may be taken as collateral security only, without affecting the original right of action<sup>5</sup>.

No merger takes place where the securities are of equal degree<sup>6</sup>. Furthermore, in order to have the effect of merging the lower remedy the security must be co-extensive with it, that is to say, it must be taken in respect of the same obligation<sup>7</sup> and the transaction must take place between the same parties<sup>8</sup>.

1 See paras 1063-1064 post. As to merger of rights and liabilities in one person see para 1065 post.

2 *Owen v Homan* (1851) 3 Mac & G 378; *Price v Moulton* (1851) 10 CB 561; *Bell v Banks* (1841) 3 Man & G 258; *Marker v Kenrick* (1853) 13 CB 188. An acknowledgment of a debt in a deed may have the effect of converting it into a specialty debt, even though there is no express covenant to pay the debt, if it appears that the deed was intended to operate as a covenant: *Saltoun v Houstoun* (1824) 1 Bing 433; *Saunders v Milsome* (1866) LR 2 Eq 573; *Isaacson v Harwood* (1868) 3 Ch App 225; *Jackson v North Eastern Rly Co* (1877) 7 ChD 573; cf *Yates v Aston* (1843) 4 QB 182; *Courtney v Taylor* (1843) 6 Man & G 851; *Iven v Elwes* (1854) 3 Drew 25.

3 This depends on the intention of the parties: *Lawrence v Casse* [1930] 2 KB 83, CA; *Barclays Bank Ltd v Beck* [1952] 2 QB 47, [1952] 1 All ER 549, CA; *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317, CA; *Hissett v Reading Roofing Co Ltd* [1970] 1 All ER 122, [1969] 1 WLR 1757; *Tito v Waddell (No 2)* [1977] Ch 106 at 284, [1977] 3 All ER 129 at 276 per Megarry V-C.

4 *Knight Sugar Co Ltd v Alberta Rly & Irrigation Co* [1938] 1 All ER 266 at 269, PC; *Goss v Chilcott* [1997] 2 All ER 110, PC.

5 *Twopenny v Young* (1824) 3 B & C 208; *Yates v Aston* (1843) 4 QB 182; *Holmes v Bell* (1841) 3 Man & G 213; *Norfolk Rly Co v M'Namara* (1849) 3 Exch 628; *Stamps Comr v Hope* [1891] AC 476, PC; *Barclays Bank Ltd v Beck* [1952] 2 QB 47, [1952] 1 All ER 549, CA.

6 *Preston v Perton* (1601) Cro Eliz 817 (judgments); *Branthwait v Cornwallis* (1627) Cro Car 85 (bond and statute staple); *Re Barrow, ex p Christie* (1832) Mont & B 352 (bond and statute); *Price v Moulton* (1851) 10 CB 561 at 574 (bond or covenant for payment of rent); *Kidd v Boone, Evans' Claim* (1871) 40 LJ Ch 531 (covenant to pay rent and bond); *Norwood v Grype* (1599) Cro Eliz 727 (deeds); *Lutterford v Le Mayre* (1620) Cro Jac 579 (bonds); *Roades v Barnes* (1756) 1 Burr 9 (bonds); *Higgins's Case* (1605) 6 Co Rep 44b; and see *Chetwynd v Allen* [1899] 1 Ch 353.

A negotiable instrument is not a higher security for this purpose: *Drake v Mitchell* (1803) 3 East 251.

7 *Barclay's Bank Ltd v Beck* [1952] 2 QB 47 at 53, [1952] 1 All ER 549 at 552, CA, obiter per Denning LJ ('when security is given for payment of amounts due, or to become due, on a running account, the doctrine of merger, if it applies at all, would at the most only apply to the indebtedness which existed at the date when the covenant was taken and the charge given. The reason is because merger can only apply to existing debts'). See also *Hissett v Reading Roofing Co Ltd* [1970] 1 All ER 122, [1969] 1 WLR 1757.

8     *White v Cuyler* (1795) 6 Term Rep 176 (deed of surety does not merge simple contract debt of principal debtor); *Holmes v Bell* (1841) 3 Man & G 213 (debt not merged in bond given by debtor and surety); *Bell v Banks* (1841) 3 Man & G 258 (debt of principal and surety; higher security given by principal to different party; no merger); *Norfolk Ry Co v M'Namara* (1849) 3 Exch 628 (bond for fixed sum to secure an existing debt and such further sums as might become due); *Ansell v Baker* (1850) 15 QB 20 (mortgage by one of the makers of joint and several note, with covenant to pay it, does not discharge the other maker); *Mowatt v Lord Lonsborough* (1854) 4 E & B 1, Ex Ch (deed by way of security executed in favour of trustees for the creditor); *Sharpe v Gibbs* (1864) 16 CBNS 527; *Boaler v Mayor* (1865) 19 CBNS 76 (covenant in mortgage deed by principal debtor not a discharge of sureties who had given a promissory note); *Chetwynd v Allen* [1899] 1 Ch 353 (equitable mortgage does not extinguish prior charge).



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### **1063. Merger in judgment.**

The commencement of one action upon a contract is no bar to the commencement of another upon the same contract<sup>1</sup>; but the two actions may be consolidated<sup>2</sup>, or the second struck out as vexatious<sup>3</sup>. However, when the former action has been pursued to judgment in a court of record<sup>4</sup> the original cause of action is merged in the judgment so that a second action cannot be brought in respect of the same cause of action<sup>5</sup>, because the inferior remedy is merged in the higher, the court of record<sup>6</sup>. So long as the judgment remains unsatisfied, however, it does not extinguish any remedy except the particular cause of action in respect of which it was recovered, and the creditor is not precluded by it from enforcing any collateral security which he may have taken<sup>7</sup>.

Once an issue has been litigated to final judgment, the parties are usually precluded from relitigating it by the doctrine of estoppel by judgment<sup>8</sup>. However, this rule has no application where the judgment was ineffective (for example where it was obtained by collusion or fraud<sup>9</sup>) or where the court had no jurisdiction<sup>10</sup>. Moreover, where there are separate distinct breaches of the one contract, the innocent party may maintain successive actions in respect of each of them<sup>11</sup>.

A judgment in an action for a principal debt does not preclude the creditor from bringing a subsequent action for interest which had accrued due prior to the date of the judgment<sup>12</sup>, nor conversely is a judgment in an action for interest only a bar to a subsequent action for the principal debt<sup>13</sup>. A judgment in action for a principal debt is, however, a bar to any claim for subsequent interest, otherwise than on the judgment<sup>14</sup>, unless the covenant to pay interest is independent of the covenant to pay the principal sum<sup>15</sup>.

1 *Harley v Greenwood* (1821) 5 B & Ald 95 at 101.

2 See RSC Ord 4 r 9; CCR Ord 13 r 9.

3 See RSC Ord 18 r 19; CCR Ord 13 r 5.

4 This includes a county court: see the County Courts Act 1984 s 1(2); and COURTS. As to foreign judgments see para 1064 post.

5 *Lord Bagot v Williams* (1824) 3 B & C 235; *Siddall v Rawcliffe* (1883) 1 Cr & M 487; *King v Hoare* (1844) 13 M & W 494; *Stewart v Todd* (1846) 9 QB 767, Ex Ch; *Re European Central Rly Co, ex p Oriental Financial Corpn* (1876) 4 ChD 33, CA; *Re Sneyd, ex p Fewings* (1883) 25 ChD 338, CA; *Wegg Prosser v Evans* [1895] 1 QB 108, CA; *Economic Life Assurance Society v Usborne* [1902] AC 147, HL; *Aman v Southern Rly Co* [1926] 1 KB 59, CA; see further CIVIL PROCEDURE. The action is not merged where the defendant ultimately sued is not in fact a party with the defendant in the former proceedings to any joint contract: *Isaacs & Sons v Salbstein* [1916] 2 KB 139 at 145, CA (judgment for the price of goods was obtained against the wrong person, and, that judgment still standing, the plaintiff was held entitled to sue the person alleged to be really liable). If a simple contract debt becomes, after an act of bankruptcy, merged in a judgment, the original debt is not extinguished for the purpose of proceedings in bankruptcy: *Re King and Beesley, ex p King and Beesley* [1895] 1 QB 189; and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 134.

6 *Greathead v Bromley* (1798) 7 Term Rep 455; *King v Hoare* (1844) 13 M & W 494; *Todd v Stewart* (1846) 9 QB 759; *Re European Central Rly Co, ex p Oriental Financial Corpn* (1876) 4 ChD 33; *Kendall v Hamilton* (1879) 4 App Cas 504, HL; *Furness, Withy & Co Ltd v Hall Ltd* (1909) 25 TLR 233; *Aman v Southern Rly Co* [1926] 1 KB 59, CA. As to judgment as against one joint, or joint and several, debtor see para 1087 post.

7 See *Popple v Sylvester* (1882) 22 ChD 98; *Economic Life Assurance Society v Usborne* [1902] AC 147, HL. Similarly, judgment on the collateral security does not bar an action on the principal contract: *Seddon v Tutop*

(1796) 6 Term Rep 607 (judgment on promissory note did not bar action for price of goods sold); *Drake v Mitchell* (1803) 3 East 251 (judgment on bill of exchange of one of three joint covenantors no bar to an action on the covenant); *Wegg Prosser v Evans* [1895] 1 QB 108, CA (judgment against one of two joint guarantors on a cheque no bar to an action against both or either of them on the guarantee).

8 See *Vervaeke v Smith* [1983] 1 AC 145, [1982] 2 All ER 144, HL; and CIVIL PROCEDURE vol 12 (2009) PARA 1168 et seq.

9 *Girdlestone v Brighton Aquarium Co* (1879) 4 Ex D 107; *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295, CA; *Vadala v Lawes* (1890) 25 QBD 310, CA; *Birch v Birch* [1902] P 130, CA.

10 *Rogers v Wood* (1831) 2 B & Ad 245.

11 *Bristowe v Fairclough* (1840) 1 Man & G 143; cf *Conquer v Boot* [1928] 2 KB 336, DC. Claims for arrears of instalments under a hire purchase agreement and for damages for breach of the agreement are separate claims and different causes of action: *Overstone Ltd v Shipway* [1962] 1 All ER 52, [1961] 1 WLR 117, CA. As to hire purchase generally see CONSUMER CREDIT. See also *HE Daniels Ltd v Carmel Exporters and Importers Ltd* [1953] 2 QB 242, [1953] 2 All ER 401.

12 *Florence v Jenings* (1857) 2 CBNS 454.

13 *Morgan v Rowlands* (1872) 41 LJQB 187.

14 *Re European Central Rly Co, ex p Oriental Financial Corpn* (1876) 4 ChD 33, CA; *Re Sneyd, ex p Fewings* (1883) 25 ChD 338, CA. As to interest on judgment debts see the Judgments Act 1838 s 17 (as amended); and CIVIL PROCEDURE vol 12 (2009) PARA 1149.

15 *Popple v Sylvester* (1882) 22 ChD 98.

## UPDATE

### 1063 Merger in judgment

TEXT AND NOTES 2, 3--RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(iii) Merger/1064. Foreign judgments.

#### **1064. Foreign judgments.**

Whereas at common law a cause of action was extinguished by the judgment of an English court of record<sup>1</sup>, a judgment of a foreign or Commonwealth court (including a court of another part of the United Kingdom) did not operate in this country as a merger of the original cause of action<sup>2</sup>. However, the latter rule was reversed by statute, and it is now provided that no proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland<sup>3</sup>.

1 See para 1063 note 4 ante.

2 *Smith v Nicolls* (1839) 5 Bing NC 208; *Bank of Australasia v Harding* (1850) 9 CB 661; *Bank of Australasia v Nias* (1851) 16 QB 717; and see *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL.

3 See the Civil Jurisdiction and Judgments Act 1982 s 34; and CONFLICT OF LAWS vol 8(3) (Reissue) para 141.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(iii) Merger/1065. Merger by concurrence of rights and liabilities in one person.

### **1065. Merger by concurrence of rights and liabilities in one person.**

In some circumstances a contract is discharged by merger when the rights and liabilities under the contract come together in the same person, the reason being that a person cannot maintain an action against himself<sup>1</sup>. Thus when the acceptor of a bill of exchange is or becomes the holder of it in his own right, at or after its maturity, the bill is discharged<sup>2</sup>.

A mere inter vivos promise by a testator (a nudum pactum) to pay a person whom he subsequently appoints executor a sum of money at some future time, which in fact was not paid, does not entitle the executor to retain the amount out of the assets in priority to the other creditors<sup>3</sup>. Further, the appointment of a creditor as a debtor's executor<sup>4</sup> or administrator does not discharge the debt, even at law; but, if the creditor proves the will, he is in equity entitled to retain his debt out of the assets in priority to other debts of equal degree<sup>5</sup>. On the other hand, the appointment of a debtor as executor of his creditor operates at law (though not necessarily in equity<sup>6</sup>) to discharge the debt when the appointment becomes effective on the creditor's death<sup>7</sup>; and this rule has been extended to administrators<sup>8</sup>.

1 *Neale v Turton* (1827) 4 Bing 149 at 151, Ex Ch, per Best CJ; *Wankford v Wankford* (1704) 1 Salk 299 at 305 per Holt CJ. Whereas this rule in the context of contract is automatic (but cf note 4 infra), the modern rule of merger in respect of leases is that it is a matter of intention: see the Law of Property Act 1925 s 185; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 640.

2 See *Harmer v Steele* (1849) 4 Exch 1, Ex Ch; the Bills of Exchange Act 1882 s 61; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) para 1554.

3 *Re Innes, Innes v Innes* [1910] 1 Ch 188 (promise by father to pay his daughter for acting as his housekeeper did not create a binding obligation, either by way of contract, trust or gift).

4 The fact that the creditor is executor of the debtor does not operate to suspend the running of time so as to prevent the debt becoming statute-barred: *Bowring-Hanbury's Trustee v Bowring-Hanbury* [1943] Ch 104, [1943] 1 All ER 48, CA. See further EXECUTORS AND ADMINISTRATORS.

5 *Rawlinson v Shaw* (1790) 3 Term Rep 557; *A-G v Jackson* [1932] AC 365 at 372, HL, per Lord Atkin; and see further EXECUTORS AND ADMINISTRATORS.

6 In equity, the debtor might be compelled to account for the debt as assets of the testator held by him, unless there was evidence of intention by the creditor to release the debt: *Strong v Bird* (1874) LR 18 Eq 315; *Re Pink* [1912] 2 Ch 528, CA; *Re James* [1935] Ch 449.

7 See *Re Applebee, Leveson v Beales* [1891] 3 Ch 422; and EXECUTORS AND ADMINISTRATORS.

8 See the Administration of Estates Act 1925 s 21A (as added); and EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(iii) Merger/1066. Alternative liabilities.

### **1066. Alternative liabilities.**

Where a debt is incurred or contract made under such circumstances as to create an alternative liability against different persons at the election of the creditor, or of one of the parties to the contract, as in the case of a contract made by an agent in his own name<sup>1</sup>, a judgment against either of the parties alternatively liable, although unsatisfied, operates as a merger, and is a bar to any action against the other. The plaintiff, by pursuing one of the parties to judgment, is conclusively deemed to have made his election<sup>2</sup>. The exceptions in relation to a judgment against one or more of a number of joint debtors<sup>3</sup> have no application to the case of an alternative liability<sup>4</sup>.

1 *Chestertons v Barone* [1987] 1 EGLR 15, CA (without legal proceedings, such an election would be inferred only in exceptional circumstances). As to the rights and liabilities of the undisclosed principal see AGENCY vol 1 (2008) PARA 125. As to election in the case of breach of condition see para 1002 et seq ante.

2 *Priestly v Fernie* (1865) 3 H & C 977; *Cross & Co v Matthews and Wallace* (1904) 91 LT 500; *Morel Bros & Co Ltd v Earl of Westmorland* [1904] AC 11, HL (husband and wife); *French v Howie* [1906] 2 KB 674, CA (similar case); *London General Omnibus Co Ltd v Pope* (1922) 38 TLR 270. The effect of such a judgment as an election cannot be avoided by getting it set aside by consent (*Cross & Co v Matthews and Wallace* supra), though it has been held that it can if the judgment is set aside on the merits (*Partington v Hawthorne* (1888) 52 JP 807; cf *French v Howie* supra at 675, CA). See also *Goodey and Southwold Trawlers Ltd v Garriock, Mason and Millgate* [1972] 2 Lloyd's Rep 369, where the plaintiff who sued the defendant's agent and in fact received back part of the money due to him, was held to have a cause of action against the defendant on the grounds that, as the agent was acting for a disclosed principal (ie the defendant), the plaintiff's only remedy was to sue the principal. As to discharge of a principal by an election to look exclusively to the agent see AGENCY vol 1 (2008) PARA 131.

3 See para 1087 post.

4 *Morel Bros & Co Ltd v Earl of Westmorland* [1904] AC 11, HL; *French v Howie* [1906] 2 KB 674, CA (agency, husband and wife). See further AGENCY vol 1 (2008) PARA 131.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(iv) Bankruptcy and Insolvency/1067. Bankruptcy of individuals.

## **(iv) Bankruptcy and Insolvency**

### **1067. Bankruptcy of individuals.**

An insolvent person<sup>1</sup> does not become bankrupt until a court adjudicates him bankrupt and makes a bankruptcy order<sup>2</sup>; and then the bankruptcy continues until that order is discharged<sup>3</sup>.

A mere declaration of insolvency by one of the parties does not entitle the other to treat the contract as being at an end, but if the declaration is made under circumstances which show an intention not to carry out the contract or an inability to do so the position is different<sup>4</sup>; and, if one party gives notice to the other of his insolvency and does nothing to show that he intends to stand by the contract, the other party may be entitled to assume repudiation of the contract<sup>5</sup> and either to insist upon performance or to treat the contract as at an end<sup>6</sup>. The insolvent person may try to avoid bankruptcy either by making with his creditors a statutory voluntary arrangement<sup>7</sup>, or entering into a deed of arrangement<sup>8</sup> or composition<sup>9</sup>.

A contract is not as a rule discharged by the bankruptcy of any of the parties to it<sup>10</sup>. However, in effect, the trustee in bankruptcy steps into the shoes of the bankrupt, so that normally that contract passes to his trustee<sup>11</sup>. In such cases, the bankrupt can no longer be sued for breach of such contract and any contractual rights against the bankrupt<sup>12</sup> will become a bankruptcy liability<sup>13</sup> payable out of the bankrupt's property held by the trustee<sup>14</sup>. However, the trustee may challenge (with a view to making them unenforceable against the bankrupt's estate) any transaction at an undervalue<sup>15</sup>, or which amounts to a preference<sup>16</sup> or an extortionate credit transaction<sup>17</sup>, or a transaction defrauding creditors<sup>18</sup>. Any disposition of property made by the bankrupt<sup>19</sup> after the commencement of the bankruptcy is void, except to the extent that the disposition is made with the consent of the court or subsequently ratified by it<sup>20</sup>. Moreover, the court may at any time after the presentation of the bankruptcy petition stay any action, execution or other process against the property or person of the debtor<sup>21</sup>.

The effect of an order of discharge of a bankrupt<sup>22</sup> is to release the bankrupt from liabilities provable in bankruptcy, with certain exceptions<sup>23</sup>. However, it does not release the ex-bankrupt from debts which were not bankruptcy debts<sup>24</sup>.

1 This includes a partnership: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 817 et seq.

2 For the grounds upon which a debtor may be made bankrupt and the manner in which a bankruptcy order may be obtained see the Insolvency Act 1986 ss 264-282 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 124 et seq.

3 See *ibid* s 278; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 213.

4 *Mess v Duffus & Co* (1901) 6 Com Cas 165; *Re Phoenix Bessemer Steel Co, ex p Carnforth Haematite Iron Co* (1876) 4 ChD 108, CA.

5 As to repudiation in general see para 997 et seq ante.

6 *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289; *Morgan v Bain* (1874) LR 10 CP 15 (cases of the sale of goods by instalments). A vendor of land is not entitled to treat an act of bankruptcy by the purchaser before the date of completion as an anticipatory breach or to rescind for the purchaser's failure to complete on the due date (*Jennings' Trustee v King* [1952] Ch 899, [1952] 2 All ER 608), except in a case where time is of the essence of the contract (*Powell v Marshall, Parkes & Co* [1899] 1 QB 710, CA); but cf *Griffiths v GWJ Blackman & Co Pty*

*Ltd* [1972] 1 NSWLR 169 (vendor committed act of bankruptcy and failed to prove his ability on day of completion to convey a clear title; held not entitled to force purchaser to complete the contract).

7 See under the Insolvency Act 1986 Pt VIII (ss 252-263). As to voluntary arrangements see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 81 et seq.

8 A deed of arrangement operates like a deed of release (as to which see para 1052 et seq ante). As to deeds of arrangement see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 859 et seq. As between the parties, a deed of release will operate as a covenant by each creditor not to sue (see para 1053 ante); but the deed may validly provide that this is not to affect the liability of any surety: *Cole v Lynn* [1942] 1 KB 142, [1941] 3 All ER 502, CA.

9 See para 1048 ante.

10 *Re Edwards, ex p Chalmers* (1873) 8 Ch App 289; *Morgan v Bain* (1874) LR 10 CP 15; *Jennings' Trustee v King* [1952] Ch 899, [1952] 2 All ER 608. Exceptions to the rule include contracts of partnership, contracts of agency (but see *Vehicle and General Insurance Co Ltd v Elmbridge Insurances* [1973] 1 Lloyd's Rep 325), and contracts between a bankrupt employer and an apprentice or trainee: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) paras 417 et seq, 677.

11 See paras 1068, 1072 post.

12 Contra rights in rem where the debt is secured, because the trustee is in no stronger position than the debtor: see para 1068. A secured creditor can always prove for the unsecured part of any qualifying debt; or he can give up his security to the trustee and prove as an unsecured creditor: see the Insolvency Act 1986 s 269; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 126.

13 See *ibid* ss 322, 382(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 491.

14 See para 1068 post.

15 See the Insolvency Act 1986 s 339; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 653.

16 See *ibid* s 340; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 657.

17 See *ibid* s 343; para 1076 post; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 672 et seq.

18 See *ibid* s 423; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 663 et seq.

19 A good discharge may sometimes be obtained for payments made to the bankrupt before his property vests in his trustee by a person who gives value and has no notice of the bankruptcy petition (see *ibid* s 284(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 417); but see *Ex p James* (1874) 9 Ch App 609. As to the vesting of the bankrupt's estate in the trustee see the Insolvency Act 1986 s 306; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 391.

20 See *ibid* s 284(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 217.

21 See *ibid* s 285; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 730.

22 See *ibid* s 280; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 629 et seq.

23 See *ibid* s 281 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 642 et seq. The discharge does not release any other person who was a partner, co-trustee or joint debtor; nor does it affect any real security if the debt was secured.

24 As to 'bankruptcy debts' see *ibid* s 382 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 491. Contra if the bankrupt has made a fresh promise for new consideration, even whilst bankrupt, to pay the debt: *Wild v Tucker* [1914] 3 KB 36.

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### **1068. The property in the bankruptcy.**

Upon a bankruptcy order being made<sup>1</sup>, with some exceptions<sup>2</sup>, all the bankrupt's property vests in his trustee in bankruptcy<sup>3</sup>, subject to the latter's right of disclaimer<sup>4</sup>. Against this fund held by the trustee in bankruptcy there may be claimed any bankruptcy debt<sup>5</sup>. 'Property' is widely defined to include choses in action<sup>6</sup>, and therefore contractual rights<sup>7</sup>. Accordingly, the rights and duties of the bankrupt under any contract pass immediately and by operation of law to his trustee<sup>8</sup>. However, any person who has contracted with the bankrupt may apply to the court to be discharged from the contract, and if it is considered equitable to do so, the court may grant the order, discharging the contract on terms and ordering any damages payable as a bankruptcy debt<sup>9</sup>.

The trustee is said to take 'subject to the equities'; that is, to step into the shoes of the debtor as regards the latter's property<sup>10</sup>. It follows that the trustee can have no greater right in that property than the bankrupt had, and so, the trustee in bankruptcy takes subject to any real security which the bankrupt has granted<sup>11</sup>; or subject to any beneficial rights where the bankrupt held his rights on trust<sup>12</sup>; or subject to any right of rescission where the bankrupt has induced the contract by fraud<sup>13</sup>; or subject to a valid assignment by the bankrupt before the commencement of the bankruptcy<sup>14</sup>. However, there are special provisions regulating set-offs<sup>15</sup>, and there are some circumstances where the trustee will have less rights than the bankrupt would have had if he had remained solvent, for example in relation to sales of goods by the bankrupt<sup>16</sup>, or in respect of his spouse's interest in the matrimonial home<sup>17</sup>.

1 See para 1067 ante.

2 There is excluded from vesting: property of a personal nature, trust property (see the Insolvency Act 1986 s 283(2), (3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 216) and rights of action which are personal to the bankrupt (see eg *Re Collins* [1925] Ch 556 (personal skill of bankrupt); *Wilson v United Counties Bank Ltd* [1920] AC 102 at 120 per Viscount Finlay and at 129-130 per Lord Atkinson, HL (defamation action)).

3 See the Insolvency Act 1986 s 283(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 216.

4 See para 1072 post.

5 As to bankruptcy debts see the Insolvency Act 1986 s 322; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 491.

6 See *ibid* s 436; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 400. For example see *Campbell Connolly & Co Ltd v Noble* [1963] 1 All ER 237, [1963] 1 WLR 252 (option to renew a copyright). However, personal rights of action are not included: see note 2 *supra*.

7 *Brandt's Son & Co v Dunlop Rubber Co* [1905] AC 454, HL; and see CHOSSES IN ACTION vol 13 (20090 PARAS 6, 13 et seq.

8 See para 758 ante.

9 See the Insolvency Act 1986 s 345; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 677.

10 The trustee takes free of any purely personal claims against the bankrupt: see note 2 *supra*.

11 See para 1067 note 12 ante.



12 *Re Kayford Ltd* [1975] 1 All ER 604, [1975] 1 WLR 279.

13 *Tilley v Bowman* [1910] 1 KB 745.

14 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1256-1258, [1965] 2 All ER 472 at 498-501 per Lord Wilberforce, HL.

15 See the Insolvency Act 1986 s 323; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 547 et seq. As to the ordinary rules for set-offs see para 1073 post; and CIVIL PROCEDURE vol 11 (2009) para 634 et seq.

16 Even though he has agreed to give the buyer credit, on the buyer's insolvency an unpaid seller of goods may exercise his rights of lien and stoppage: see the Sale of Goods Act 1979 ss 41(1)(c), 44; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 242, 256.

17 As to rights of occupation of a bankrupt's spouse see the Insolvency Act 1986 s 336 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 648. As to the right of occupation of the bankrupt see s 337 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 650.

## **UPDATE**

### **1068 The property in the bankruptcy**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(iv) Bankruptcy and Insolvency/1069. Appointment of administrative receiver for an insolvent registered company.

### **1069. Appointment of administrative receiver for an insolvent registered company.**

An administrative receiver<sup>1</sup> appointed to manage the company's assets for the benefit of secured creditors is not only the company's agent but also prima facie personally liable on any contract so entered into by him in the carrying out of his functions (except in so far as the contract otherwise provides) and, to the extent of any qualifying liability, on any contract of employment adopted by him in the carrying out of those functions<sup>2</sup>. Normally, his appointment does not amount to a repudiation of the company's trading contracts<sup>3</sup>; nor can they be specifically enforced against him<sup>4</sup>. However, where he orders goods for the purposes of the company's business, an administrative receiver prima facie pledges his personal credit<sup>5</sup>. His authority is terminated by the winding up of the company<sup>6</sup>.

1 As to administrative receivers see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 380 et seq. As to corporate insolvency generally see COMPANY AND PARTNERSHIP INSOLVENCY.

2 Insolvency Act 1986 s 44(1) (amended by the Insolvency Act 1994 s 2); and see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 402.

3 *Airlines Airspares Ltd v Handley Page Ltd* [1970] Ch 193, [1970] 1 All ER 29.

4 This is to prevent the unsecured creditors being preferred over the secured creditors: *Hill (Edwin) & Partners v First National Finance Corp'n plc* [1988] 3 All ER 801, [1989] 1 WLR 225, CA. But see *Ash & Newman Ltd v Creative Devices Research Ltd* [1991] BCLC 403. The receiver may not be sued for the tort of inducing a breach of contract: see *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, [1992] BCC 270, CA; and see para 611 ante.

5 See note 2 supra.

6 *Thomas v Todd* [1926] 2 KB 511 (voluntary winding up); *Gosling v Gaskell* [1897] AC 575, HL (compulsory winding up).

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**1070. Appointment of administrator for an insolvent registered company.**

Once a company appoints an administrator to manage it as agent for the benefit of its creditors<sup>1</sup>, no proceedings may be brought against the company and no security enforced against it<sup>2</sup>. However, this does not preclude a person who has contracted with the company from serving notice on it making time of the essence, nor his accepting a repudiatory breach by the company<sup>3</sup>. Contracts entered into by an administrator as agent on behalf of the company bind the company but not the administrator personally<sup>4</sup>.

1 See the Insolvency Act 1986 s 14(5); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 159. As to his general powers see s 14(1)(b), Sch 1; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 163.

2 See *ibid* s 11(3); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 157.

3 *Re Olympia & York Canary Wharf Ltd* [1993] BCLC 453.

4 See *Re Atlantic Computer Systems plc* [1992] Ch 505, [1992] 1 All ER 476, CA. See also *Re Hartlebury Printers Ltd (in liquidation)* [1993] 1 All ER 470; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 159.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(iv) Bankruptcy and Insolvency/1071. Winding up of registered companies.

### **1071. Winding up of registered companies.**

The commencement of a winding up of a company does not in general put an end to a contract to which that company is a party<sup>1</sup>; nor does it necessarily amount to a repudiation of such a contract<sup>2</sup>. However, the powers of directors are automatically brought to an end by a compulsory winding up<sup>3</sup>. In the case of employees and directors of the company, the making of a winding-up order operates as a dismissal<sup>4</sup>. On the other hand, a resolution to wind up voluntarily will not necessarily bring an end to the powers of directors<sup>5</sup>, nor terminate contracts of employment<sup>6</sup>. The dissolution of a company puts an end to its existence<sup>7</sup>.

Whilst the directors are displaced, the liquidator has the power to carry on the business of the company, so far as may be necessary for its beneficial winding up<sup>8</sup>. An order for winding up does not vest the company's property in the liquidator unless a vesting order is made<sup>9</sup>; and there are statutory provisions as to disclaimer of onerous contracts<sup>10</sup> and the adjustment of prior transactions<sup>11</sup>. However, where a court-appointed liquidator does perform the company's existing contracts, or where he makes new contracts on behalf of the company, prima facie he acts as agent of the company<sup>12</sup>. Further, after his appointment, any purported disposition of the company's property is prima facie void<sup>13</sup>. However, the court has a wide discretion as to the validation of prior bona fide transactions<sup>14</sup> and the fair distribution of the company's assets between its unsecured creditors<sup>15</sup>. At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may apply to the court for a stay of proceedings<sup>16</sup>. After a winding-up order has been made, unless the court orders otherwise, any disposition of the company's property, and any transfer of shares is void<sup>17</sup>; and any attachment, sequestration, distress or execution put in force against the estate or effects of the company after commencement of the winding up is void<sup>18</sup>. Where a company is being wound up voluntarily, the court has jurisdiction to stay any action or proceeding against a company<sup>19</sup>.

In the case of an insurance company which has been proved to be unable to pay its debts, the court may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as it thinks just, in place of making a winding-up order<sup>20</sup>.

1 *Tolhurst v Associated Portland Cement Manufacturers (1900)* [1902] 2 KB 660 at 678, CA, per Cozens-Hardy LJ; affd on other grounds [1903] AC 414, HL. As to winding up generally see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 432 et seq.

2 *British Waggon Co v Lea* (1880) 5 QBD 149.

3 *Fowler v Broad's Patent Night Light Co* [1893] 1 Ch 724; and see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 490.

4 *Re General Rolling Stock Co, Chapman's Case* (1866) LR 1 Eq 346; and see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 490.

5 The company may sanction their continuance in general meeting: see the Insolvency Act 1986 ss 91(2), 103; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 960, 997.

6 *Midland Counties District Bank Ltd v Attwood* [1905] 1 Ch 357; and see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 997.

7 See the Insolvency Act 1986 ss 201-205; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 929 et seq. The existence of continuing contractual obligations may prevent the making of a dissolution

order: *Tolhurst v Associated Portland Cement Manufacturers (1900)* [1902] 2 KB 660 at 678, CA, per Cozens-Hardy LJ; affd on other grounds [1903] AC 414, HL.

8 *Leon v York-O-Matic Ltd* [1966] 3 All ER 277, [1966] 1 WLR 1450; and see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 578; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 997.

9 See the Insolvency Act 1986 s 145; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 575.

10 See para 1072 post.

11 The court may make such an adjustment where there is a transaction at an undervalue (see the Insolvency Act 1986 ss 238, 240, 241 (s 241 as amended)), a preference (see ss 239, 240, 241 (s 241 as amended)), an extortionate credit bargain (see s 244) or in respect of certain floating charges (see s 245). See further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 843 et seq.

12 *Re Anglo-Moravian Hungarian Junction Rly Co* (1875) 1 ChD 130, CA.

13 See the Insolvency Act 1986 s 127; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 700.

14 *Re Wiltshire Iron Co* (1868) 3 Ch App 443; and see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 700.

15 *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21.

16 See the Insolvency Act 1986 s 126; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) paras 473; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 887.

17 See *ibid* s 127; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 700.

18 See *ibid* s 128; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 888.

19 See *ibid* s 112; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1012. As to voluntary winding up see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 939 et seq.

20 See the Insurance Companies Act 1982 s 58; and INSURANCE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(iv) Bankruptcy and Insolvency/1072. Disclaimer.

### **1072. Disclaimer.**

As a general rule, the benefit of any contracts of a bankrupt pass to his trustee in bankruptcy, who may complete them for the benefit of the estate<sup>1</sup>. Similarly, the liquidator of a company may carry on the business of a company so far as may be necessary for its beneficial winding up<sup>2</sup>. However, unprofitable contracts may be disclaimed by the trustee in bankruptcy<sup>3</sup> or liquidator<sup>4</sup>; and any person injured by the disclaimer is entitled to prove in respect of his injury as a debt in the bankruptcy or winding up<sup>5</sup>. Further, the court, on the application of any person who is as against the trustee or liquidator entitled to the benefit or subject to the burden of a contract made with the bankrupt or the insolvent company, may make an order rescinding the contract (or discharging obligations under it) on such terms as to payment by or to either party of damages for the non-performance of the contract or otherwise as may seem equitable to the court, and any damages payable under the order to any such person may be proved by him as a debt in the bankruptcy or winding up<sup>6</sup>.

1 See para 1068 ante.

2 See para 1071 ante.

3 See the Insolvency Act 1986 s 315 (as amended), ss 316-321; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 472 et seq.

4 See *ibid* ss 178-182; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 866.

5 See *ibid* s 315(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 474; s 178(4)(b); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 868.

6 See *ibid* s 345; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 677; s 186; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 875.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(v) Other Cases/1073. Rights of set-off and counterclaim.

## **(v) Other Cases**

### **1073. Rights of set-off and counterclaim.**

Where a right of action has accrued for breach of contract, the parties may agree that there shall be set off against the creditor's claim the amount of a debt due from him to the debtor. This is equivalent to payment to the extent of the amount set off<sup>1</sup>.

In an attempt to reduce cross-actions, the rules of court provide that, where an action has been brought in respect of a breach of contract, the defendant may set off or set up by way of counterclaim against the plaintiff's claim any right or claim whether sounding in damages or not, and such set-off or counterclaim has the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross-claim<sup>2</sup>.

<sup>1</sup> See para 943 ante.

<sup>2</sup> RSC Ord 15 r 2; Ord 18 r 17. As to counterclaim and set-off in general see CIVIL PROCEDURE vol 11 (2009) para 634 et seq.

## **UPDATE**

### **1073 Rights of set-off and counterclaim**

TEXT AND NOTE 2--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(v) Other Cases/1074. Limitation of actions.

**1074. Limitation of actions.**

A right of action for breach of contract, if not exercised within a certain time, is barred by the statutory rules of limitation<sup>1</sup>; but the contract is not thereby discharged<sup>2</sup>. The limitation period is normally six years for actions on simple contracts<sup>3</sup> and 12 years for actions on contracts made by deed<sup>4</sup>.

1 As to limitation generally see LIMITATION PERIODS.

2 See *Wainford v Barker* (1697) 1 Ld Raym 232; and LIMITATION PERIODS.

3 See the Limitation Act 1980 s 5; and LIMITATION PERIODS vol 68 (2008) PARA 955 et seq.

4 See *ibid* s 8; and LIMITATION PERIODS vol 68 (2008) PARA 975 et seq.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(v) Other Cases/1075. Protection of persons in armed forces.

### **1075. Protection of persons in armed forces.**

Statutory provisions exist for the protection of the interests of persons called up or volunteering for service in the armed forces<sup>1</sup> of the Crown<sup>2</sup>.

With reference to the law of contract, the most important provision is that which provides that, in general, judgments for the payment of sums of money may not be enforced against the debtor save with the leave of the appropriate court<sup>3</sup>. It should be noted, however, that there are several circumstances in which this provision does not operate. In particular it does not apply to the enforcement of judgments or orders of a county court<sup>4</sup>, or to judgments or orders for the recovery of debts which become due by virtue of contracts entered into by debtors after the commencement of their military service<sup>5</sup>.

Provision is made for the exclusion from the jurisdiction of United Kingdom<sup>6</sup> courts of proceedings regarding the pay, terms of service and discharge from service of members of visiting forces and civilian components of those forces<sup>7</sup>.

1 As to the persons protected see the definition of 'relevant service' contained in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 64(1), Sch 1 (as amended). The protection does not apply to regular members of the armed forces. See further ARMED FORCES.

2 Ibid Pt I (ss 1-13) (as amended) provides for protection against certain legal remedies; Pt II (ss 14-25) (as amended) and Pt III (ss 26-36) (as amended) give protection against insecurity of tenure of residence and business premises; Pt VI (ss 54-59) (as amended) gives protection against loss of benefits under contracts with industrial assurance companies and friendly societies. See further ARMED FORCES.

3 See ibid s 2(1) (as amended); s 3(1); and ARMED FORCES.

4 See ibid s 2(1) (as amended); and ARMED FORCES.

5 See ibid s 2(1)(b); and ARMED FORCES. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANIES; FINANCIAL SERVICES AND INSTITUTIONS; INDUSTRIAL ASSURANCE; LANDLORD AND TENANT; REAL PROPERTY.

6 For the meaning of 'United Kingdom' see para 791 note 3 ante.

7 See the Visiting Forces Act 1952; and ARMED FORCES.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(v) Other Cases/1076. Regulated agreements.

### **1076. Regulated agreements.**

Where the parties have entered a regulated agreement<sup>1</sup> under the Consumer Credit Act 1974, there are a number of circumstances where that agreement may be discharged under the statute<sup>2</sup>.

A regulated agreement must be made in writing; and there are a number of circumstances where failure to comply with the statutory requirements as to formalities makes a regulated agreement not properly executed<sup>3</sup>. In this case, the agreement remains enforceable as against the creditor or owner<sup>4</sup>, but it is made unenforceable as against the debtor or hirer without a court order<sup>5</sup>.

A regulated agreement will be a cancellable agreement<sup>6</sup> if it is preceded by oral representations made by, or on behalf of, the creditor or owner in the presence of the debtor or hirer unless either (1) the agreement was secured on, or relates to, land; or (2) the unexecuted agreement was signed by the debtor or hirer at trade premises<sup>7</sup>. A cancellable agreement may be cancelled by the debtor or hirer giving due notice<sup>8</sup> within the prescribed cooling-off period<sup>9</sup>, in which case the agreement is to be treated as if it had never been entered into<sup>10</sup>.

In respect of regulated conditional sale agreements<sup>11</sup> and regulated hire-purchase agreements<sup>12</sup> only, once the debtor has paid to the creditor one-third of the total price of the goods, the creditor is not entitled to recover possession of the goods from the debtor except on an order of the court<sup>13</sup>. If the creditor recovers possession of such protected goods<sup>14</sup> in breach of this rule, the regulated agreement, if not previously terminated, is terminated; and the debtor is released from all liability under it<sup>15</sup>.

Where the owner under a regulated consumer hire agreement recovers possession of the goods to which the agreement relates otherwise than by action, the court may grant financial relief to the hirer<sup>16</sup>.

If a court finds a credit bargain extortionate<sup>17</sup>, it is empowered to reopen the credit agreement<sup>18</sup>, in which case it may do any of the following: direct accounts to be taken; set aside the whole or any part of any obligation imposed on the debtor or a surety; require the creditor to repay the whole or any part of any sum paid under the bargain; direct the return of property to a surety; or alter the terms of the credit agreement or any security instrument<sup>19</sup>.

1 For the meaning of 'regulated agreement' see the Consumer Credit Act 1974 s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) para 79. The Consumer Credit Act 1974 requires the debtor or hirer to be a natural person and the amount outstanding to be less than a specified figure: see s 8 (as amended); s 15 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) paras 81-82. For the meaning of 'debtor' see CONSUMER CREDIT vol 9(1) (Reissue) para 81; and for the meaning of 'hirer' see CONSUMER CREDIT vol 9(1) (Reissue) para 82. A regulated agreement may be one of two sorts: (1) a consumer credit agreement, eg credit sale, conditional sale, hire-purchase, or loan, whether secured (mortgage, pledge) or unsecured (budget account, check trading, credit card, bank overdraft, personal loan); or (2) a consumer hire agreement (ie an agreement for the bailment of goods, sometimes referred to as hiring, leasing or rental). For the meaning of 'consumer credit agreement' see CONSUMER CREDIT vol 9(1) (Reissue) para 81; and for the meaning of 'consumer hire agreement' see CONSUMER CREDIT vol 9(1) (Reissue) para 82.

2 As to the circumstances where a regulated agreement may be discharged under the Consumer Credit Act 1974 see the text and notes 3-19 *infra*. It is not possible to contract out of the statutory provisions: see s 173; and CONSUMER CREDIT vol 9(1) (Reissue) para 199.

3 See *ibid* s 55(2); and CONSUMER CREDIT vol 9(1) (Reissue) para 158 (pre-contract disclosure); ss 58, 61(2); and CONSUMER CREDIT vol 9(1) (Reissue) para 160 (land mortgages); s 61; and CONSUMER CREDIT vol 9(1) (Reissue) para 160 (signing agreements in proper form); ss 62(3), 64(5); and CONSUMER CREDIT vol 9(1) (Reissue) paras 171-172 (supplying of copies); s 105(4), (5); and CONSUMER CREDIT vol 9(1) (Reissue) para 200 (form and content of securities).

4 For the meaning of 'creditor' see CONSUMER CREDIT vol 9(1) (Reissue) para 81; and for the meaning of 'owner' see CONSUMER CREDIT vol 9(1) (Reissue) para 82.

5 See the Consumer Credit Act 1974 s 65(1); and CONSUMER CREDIT vol 9(1) (Reissue) para 169.

6 For the meaning of 'cancellable agreement' within the Consumer Credit Act 1974 see CONSUMER CREDIT vol 9(1) (Reissue) para 183.

7 See the Consumer Credit Act 1974 s 67; and CONSUMER CREDIT vol 9(1) (Reissue) para 184. As to doorstep cash sales see para 1077 post.

8 See *ibid* s 69(1); and CONSUMER CREDIT vol 9(1) (Reissue) para 185.

9 See *ibid* s 68; and CONSUMER CREDIT vol 9(1) (Reissue) para 184.

10 See *ibid* s 69(4); and CONSUMER CREDIT vol 9(1) (Reissue) para 185.

11 For the meaning of 'conditional sale agreement' see *ibid* s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) para 93.

12 For the meaning of 'hire-purchase agreement' see *ibid* s 189(1); and CONSUMER CREDIT vol 9(1) (Reissue) para 95.

13 See *ibid* s 90; and CONSUMER CREDIT vol 9(1) (Reissue) para 265.

14 For the meaning of 'protected goods' see *ibid* s 90(7); and CONSUMER CREDIT vol 9(1) (Reissue) para 265.

15 See *ibid* s 91; and CONSUMER CREDIT vol 9(1) (Reissue) para 265.

16 See *ibid* s 132; and CONSUMER CREDIT vol 9(1) (Reissue) para 295.

17 For the meaning of 'credit bargain' see *ibid* s 137(2)(b); and CONSUMER CREDIT vol 9(1) (Reissue) para 269. A credit bargain extends beyond the credit agreement (see note 18 *infra*) to include ancillary transactions: see CONSUMER CREDIT vol 9(1) (Reissue) para 269. As to when a credit bargain is extortionate see s 138; and CONSUMER CREDIT vol 9(1) (Reissue) para 269.

18 See *ibid* ss 137, 139 (as amended). For the meaning of 'credit agreement' see s 137(2)(a); and CONSUMER CREDIT vol 9(1) (Reissue) para 269. This jurisdiction does not extend to hiring agreements; but in respect of credit agreements it extends beyond regulated consumer credit agreements, since it is not restricted to agreements falling within the monetary limit: see CONSUMER CREDIT vol 9(1) (Reissue) para 269. A similar jurisdiction has since been introduced in respect of insolvency: see para 1067 *et seq ante*.

19 See *ibid* s 139(2); and CONSUMER CREDIT vol 9(1) (Reissue) para 270. For the meaning of 'surety' see CONSUMER CREDIT vol 9(1) (Reissue) para 200; and for the meaning of 'security instrument' see CONSUMER CREDIT vol 9(1) (Reissue) para 200.

## UPDATE

### 1076-1077 Regulated agreements, Other cancellable agreements

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(v) Other Cases/1077. Other cancellable agreements.

### **1077. Other cancellable agreements.**

The parties to a contract may, of course, provide in their contract that one of them shall have a unilateral right to cancel it<sup>1</sup>. However, it is seldom done. Following the success of regulated cancellable agreements as a consumer protection measure<sup>2</sup>, Parliament has since employed the technique in several other fields to grant consumers compulsory cancellation rights. This has been done in relation to life insurance<sup>3</sup>, doorstep selling<sup>4</sup>, investment agreements<sup>5</sup> and timeshares<sup>6</sup>.

Where the parties enter into what is termed long term insurance business<sup>7</sup>, statute requires that the insured has a cooling-off period, during which he may serve a cancellation notice, which operates to rescind any contract or withdraw any offer<sup>8</sup>.

Where a trader agrees to supply goods or services to a consumer during an unsolicited visit to the consumer's home or place of work, the consumer is entitled to a cooling-off period within which he may cancel the transaction<sup>9</sup>.

The Secretary of State has power to make rules for enabling a person, who has entered or offered to enter into an investment agreement<sup>10</sup> with an authorised person, to rescind the agreement or withdraw the offer within such period and in such manner as may be prescribed<sup>11</sup>.

Where a timeshare agreement is made in respect of living accommodation, the business party must give the consumer a right to cancel the agreement within a cooling-off period<sup>12</sup>, which will have the effect of cancelling both the timeshare agreement<sup>13</sup> and any related timeshare credit agreement which finances it<sup>14</sup>.

1 See para 962 ante.

2 See para 1076 ante; and CONSUMER CREDIT.

3 See the text and notes 7-8 infra.

4 See the text and note 9 infra.

5 See the text and notes 10-11 infra.

6 See the text and notes 12-14 infra.

7 For the meaning of 'long term business' see the Insurance Companies Act 1982 s 1(1), Sch 1 (as amended); and INSURANCE vol 25 (2003 Reissue) para 21.

8 See *ibid* s 76 (as amended); and INSURANCE vol 25 (2003 Reissue) para 840.

9 See the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117 (as amended) which implement EC Council Directive 85/577 (OJ L372, 31.12.85, p 31); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 663 et seq.

10 For the meaning of 'investment agreement' see the Financial Services Act 1986 s 44(9), Sch 1 Pt II (as amended).

11 See *ibid* s 51(1).

12 See the Timeshare Act 1992 ss 2, 5 (both as amended); s 5A (as added); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 875 et seq.

13 See *ibid* ss 2(2)(b), 5(4) (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 875 et seq.

14 See *ibid* s 2(2A) (as added); s 6 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 875 et seq.

## **UPDATE**

### **1076-1077 Regulated agreements, Other cancellable agreements**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### **1077 Other cancellable agreements**

NOTE 9--SI 1987/2117 replaced: Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816.

TEXT AND NOTES 10, 11--Financial Services Act 1986 repealed: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/8. DISCHARGE OF CONTRACTUAL PROMISES/(6) DISCHARGE BY SUBSEQUENT EVENT/(v) Other Cases/1078. Death.

### 1078. Death.

In considering the effect of death on rights under a contract<sup>1</sup>, it is necessary to distinguish between discharge of the contract itself and discharge of an accrued right of action for breach of contract.

The general rule is that the death of one of the parties<sup>2</sup> to a contract does not discharge the contract. Thus the personal representatives<sup>3</sup> of the deceased party may complete performance and sue for the exchange bargained for<sup>4</sup> and, indeed, they are bound to complete performance at the demand of the other party so far as the assets of the estate will allow<sup>5</sup>. However, unless empowered to do so by the testator's will, an executor is not entitled to carry on the deceased's business<sup>6</sup>, except for the purpose of winding it up<sup>7</sup>. If he goes beyond that, he will be personally liable<sup>8</sup>. Where an executor indorses a bill of exchange he is not personally liable if he signs in his representative capacity<sup>9</sup>, but will be liable if he does not so indicate<sup>10</sup>.

Where the contract is of a personal nature the general rule does not apply; such a contract will be discharged by the death of any party to it whose personal characteristics may be regarded as an important element in the contract<sup>11</sup>, but the personal representative can sue for money earned during his lifetime by the deceased<sup>12</sup>.

Where, however, there is already a vested right of action for breach of contract, the death of either party has no effect upon it<sup>13</sup>, whether or not it arose from a contract of a personal nature<sup>14</sup>.

1 As to the effect of death in relation to formation of contract see para 648 ante.

2 As to the effect of death on joint obligations see para 1082 post.

3 As to personal representatives see generally EXECUTORS AND ADMINISTRATORS.

4 *Marshall v Broadhurst* (1831) 1 Cr & J 403; *Werner v Humphreys* (1841) 2 Man & G 853; see also *Wilson v Harper* [1908] 2 Ch 370 (death of a person, to whom a firm had agreed to pay commission on accounts of persons introduced by him 'so long as we do business with them', did not terminate the liability, which continued in favour of his executors so long as the firm did business with the persons so introduced).

5 *Williams v Burrell* (1845) 1 CB 402; *Wills v Murray* (1850) 4 Exch 843; *Kennewell v Dye* [1949] Ch 517, [1949] 1 All ER 881; and see EXECUTORS AND ADMINISTRATORS.

6 However, a passive interest in a business may continue: *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL. By carrying on the testator's business his executor is not necessarily made a partner in it: *Re Fisher & Sons* [1912] 2 KB 491; and see EXECUTORS AND ADMINISTRATORS.

7 See *Re Morgan, Pillgrem v Pillgrem* (1881) 18 ChD 93, CA; and EXECUTORS AND ADMINISTRATORS.

8 The other party will have no remedy against the testator's estate: *Re Morgan, Pillgrem v Pillgrem* (1881) 18 ChD 93, CA; *Re Evans* (1887) 34 ChD 597, CA; and EXECUTORS AND ADMINISTRATORS.

9 See the Bills of Exchange Act 1882 ss 26(1), 31(5); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1476, 1495, 1607.

10 See *King v Thom* (1786) 1 Term Rep 487.

11 The contract is frustrated by the death: see para 903 ante.

12     *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311. He may also sue for payments which accrued after death: *Wilson v Harper* [1908] 2 Ch 370; and see EXECUTORS AND ADMINISTRATORS.

13     See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (as amended); and EXECUTORS AND ADMINISTRATORS.

14     *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311 (employment); see EMPLOYMENT.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(1) NATURE OF JOINT AND SEVERAL PROMISES/(i) Introduction/1079. In general.

## 9. JOINT AND SEVERAL PROMISES

### (1) NATURE OF JOINT AND SEVERAL PROMISES

#### (i) Introduction

##### 1079. In general.

Any number of persons may join in making or accepting a promise; and a promise made by several persons may be (1) joint; (2) several; or (3) joint and several<sup>1</sup>.

Joint liability arises where two or more persons jointly promise<sup>2</sup> to do the same thing; for instance, B and C jointly promise to pay £100 to A. In the case of a joint promise, there is only one obligation, namely a single payment of £100. Each of B and C is liable for the performance of the whole promise<sup>3</sup> but payment of £100 by one discharges the other<sup>4</sup>. Joint liability is subject to a number of strict and technical rules of law which are discussed below<sup>5</sup>.

Several liability arises where two or more persons make separate promises to another; for instance B and C each promise to pay £100 to A. In this case, the several promises by B and C are cumulative<sup>6</sup>. Thus, A may recover a total of £200, being £100 from B and £100 from C; and payment of £100 by one of them does not discharge the other. There are, therefore, two separate contracts, one between A and B, and the other between A and C, and there is no privity between B and C<sup>7</sup>.

Joint and several liability arises where two or more persons join in the same instrument in making a promise to the same person, and at the same time each of them individually makes the same promise to that same promisee; for instance B and C jointly promise to pay £100 to A, but both B and C also separately promise A that £100 will be paid to him by either B or C. Joint and several liability is similar to joint liability in that the co-promisors are not cumulatively liable, so that payment of £100 by B to A discharges C<sup>8</sup>; but it is free of most of the technical rules governing joint liability<sup>9</sup>.

Where two or more persons are liable in contract or tort in respect of the same damage (whether jointly or otherwise), any person liable may obtain a contribution from any of those others<sup>10</sup>.

1 Which type of promise has been made is a question of construction: see para 1083 post.

2 For the situation where it is intended that a promise be made between several persons jointly, but one of them fails to enter the agreement, see para 662 ante.

3 *Cabell v Vaughan* (1669) 1 Wms Saund 288; *Cloud v Nicholson* (1724) 8 Mod Rep 242; *Herries v Jamieson* (1794) 5 Term Rep 553; *Richards v Heather* (1817) 1 B & Ald 29; *Mountstephen v Brooke* (1818) 1 B & Ald 224; *King v Hoare* (1844) 13 M & W 494 at 505 per Parke B; *Kendall v Hamilton* (1879) 4 App Cas 504, HL; *Royal Albert Hall Corpn v Winchilsea* (1891) 7 TLR 362 at 364, CA, per Lindley LJ; *Lockett v A and M Charles Ltd* [1938] 4 All ER 170. See also para 927 ante.

4 Where one of the defendants sets up a defence which goes to the whole cause of action, the other joint contractors are entitled to the benefit of it, though they have not pleaded it: see para 1085 post.

5 See paras 1080-1082 post.

6 *Mikeover Ltd v Brady*[1989] 3 All ER 618, CA. However, it is possible for several liability not to be cumulative, so that payment by B does discharge C: see *Deanplan Ltd v Mahmoud*[1993] Ch 151, [1992] 3 All ER 945.

7 Eg as in the contracts which would result from the use by different persons of the smoke ball in response to the offer made in *Carlill v Carbolic Smoke Ball Co*[1893] 1 QB 256, CA. See also *Re Wyvern Developments Ltd*[1974] 2 All ER 535, [1974] 1 WLR 1097.

8 See para 1085 post.

9 See further para 1084 post.

10 See the Civil Liability (Contribution) Act 1978; and DAMAGES; TORT.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(1) NATURE OF JOINT AND SEVERAL PROMISES/(ii) Joint Promises/1080. Joint promisors.

## (ii) Joint Promises

### 1080. Joint promisors.

The general rule is that where several persons join in making a promise each of them is liable for the performance of the whole promise<sup>1</sup>. Thus a joint promise by an adult and a minor is generally binding on the adult notwithstanding that it may be void or voidable as regards the minor<sup>2</sup>; but, where the contract envisages performance by the minor, the adult being joined only as guarantor, the adult is not liable unless the minor is liable<sup>3</sup>.

Since a joint promise creates only one obligation<sup>4</sup>, all the promisors must generally be joined as defendants to the action<sup>5</sup>. Indeed, the general rule<sup>6</sup> is that *prima facie*<sup>7</sup> a joint promisor has the right to insist upon the other joint promisors<sup>8</sup> being joined as co-defendants; and that he may apply for a stay of proceedings until they are so joined<sup>9</sup>.

By way of exception, there is no need to join a joint party who falls within one of the following categories<sup>10</sup>: one who is an undischarged bankrupt<sup>11</sup>; or is outside the jurisdiction<sup>12</sup>; or whose promise is void or voidable by reason of his minority<sup>13</sup>; or who is protected by the limitation period<sup>14</sup>; or is a member of a firm of common carriers<sup>15</sup>; or is an undisclosed sleeping partner<sup>16</sup>; or is an active partner of one who represented himself as being the sole contracting party<sup>17</sup>; or if the action is brought in the county court<sup>18</sup>.

1 See para 1079 ante. As to acceptance by joint promisors see para 662 ante; and as to discharge of joint contractors see para 1085 et seq post. A misrepresentation made to one joint promisor may enable all of them to rescind: see Glanville Williams *Joint Obligations* (1949) para 78. As to misrepresentation see generally MISREPRESENTATION AND FRAUD.

2 *Gibbs v Merrill* (1810) 3 Taunt 307; *Burgess v Merrill* (1812) 4 Taunt 468; *Lovell and Christmas v Beauchamp*[1894] AC 607, HL; *Yeoman Credit Ltd v Latter*[1961] 2 All ER 294, [1961] 1 WLR 828, CA. See now the Minors' Contracts Act 1987; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 12 et seq.

3 *Coutts & Co v Browne-Lecky*[1947] KB 104, [1946] 2 All ER 207; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

4 See para 1079 ante.

5 *Kendall v Hamilton*(1879) 4 App Cas 504 at 544, HL, per Lord Blackburn; *Re Hodgson, Beckett v Ramsdale*(1885) 31 ChD 177, CA; *Pilley v Robinson*(1887) 20 QBD 155; *Norbury Natzio & Co v Griffiths*[1918] 2 KB 369, CA. As to joinder in the case of joint promisees see para 1081 post.

6 See the cases cited in note 5 supra.

7 It has been said that the application ought to be granted or refused on the same principles as those on which a plea in abatement (see note 9 infra) would have succeeded or failed: *Kendall v Hamilton*(1879) 4 App Cas 504 at 516, HL, per Earl Cairns LC; *Pilley v Robinson*(1887) 20 QBD 155.

8 It is not always possible for the court to decide at this stage whether or not the parties are joint contractors; and it is sufficient that the defendant makes out a reasonable and probable case of a joint contract: *Fardell Traction Haulage Co Ltd v Basset* (1899) 15 TLR 204, CA; *Norbury Natzio & Co Ltd v Griffiths*[1918] 2 KB 369, CA.

9 RSC Ord 15 r 4(3) (revoked except in relation to those actions to which the Civil Liability (Contribution) Act 1978 does not apply by virtue of s 7). At common law, a joint contractor sued alone could set up the non-joinder by a plea in abatement. Pleas in abatement were abolished in 1883 and replaced by the rules of court made under the Judicature Act 1873. The relevant rule grants the court a discretion (*Wilson, Sons & Co Ltd v Balcarres*

*Brook Steamship Co Ltd*[1893] 1 QB 422, CA); it has been said that the issue remains the same as at common law (as to which see note 7 supra); and the court will refuse joinder if the plaintiff has done everything in his power to effect service on the absent defendants (*Robinson v Geise*[1894] 2 QB 685, CA).

As to adding defendants see RSC Ord 15 r 6; as to signing judgment in default against one of several defendants see Ord 13 rr 1, 3, 5; and CIVIL PROCEDURE.

10 As to a joint promise see para 1081 post.

11 See the Insolvency Act 1986 s 345(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) paras 434, 677.

12 *Wilson, Sons & Co Ltd v Balcarres Brook Steamship Co Ltd*[1893] 1 QB 422, CA; and see CIVIL PROCEDURE.

13 *Gibbs v Merrill* (1810) 3 Taunt 307; *Burgess v Merrill* (1812) 4 Taunt 468; Cf *Chaplin v Leslie Frewin (Publishers) Ltd*[1966] Ch 71, [1965] 3 All ER 764, CA; and see the text and notes 2-3 supra.

14 Eg where one joint debtor has acknowledged the debt and the other has not: see the Limitation Act 1980 s 31(6); and LIMITATION PERIODS vol 68 (2008) PARAS 1214, 1217. See also para 1085 post.

15 See the Carriers Act 1830 s 5 (as amended); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 28.

16 *De Mautort v Saunders* (1830) 1 B & Ad 398; and see PARTNERSHIP.

17 *Baldney v Ritchie* (1816) 1 Stark 338; *Stansfeld v Levy* (1820) 3 Stark 8.

18 See the County Courts Act 1984 s 48(1); CCR Ord 5 rr 2, 9, 10; Ord 25 r 10; and COURTS.

## UPDATE

### 1080 Joint promisors

NOTE 9--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 18--CCR Ord 5, Ord 25 r 10 revoked: SI 2006/1689.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(1) NATURE OF JOINT AND SEVERAL PROMISES/(ii) Joint Promises/1081. Joint promisees.

### 1081. Joint promisees.

Where, by a simple contract or a contract made by deed entered into before 1926, a promise was made to a number of persons jointly, they were entitled collectively to performance of it. Proceedings to enforce the performance of such a promise could be taken only in the names of all the joint promisees<sup>1</sup>; one of them could not sue alone, because the promise was made to all of them jointly, and not to any of them separately<sup>2</sup>. Where a joint promisee refused to be joined as a plaintiff in the proceedings, he might, after tender of an indemnity against costs, be made a defendant<sup>3</sup>. The effect was that at common law where a promise was made to two or more persons jointly, it could be enforced by any of the promisees. This is certainly the case with regard to a promisee who has supplied any part of the consideration<sup>4</sup>, and it was probably also the case where he had provided no part of the consideration<sup>5</sup>; but there should be distinguished the situation of joint and several promisees<sup>6</sup>.

Where, in a contract made by deed<sup>7</sup> entered into after 31 December 1881<sup>8</sup>, a promise is made to persons jointly with the aim of shortening the deed it is provided by statute that prima facie the promise is construed as being made also with each of them; it is deemed to be a joint and several promise, and each joint promisee may therefore bring an action on the promise without joining the other promisees<sup>9</sup>. This principle applies only if and so far as a contrary intention is not expressed in the contract, and has effect subject to the contract and to the provisions contained in it<sup>10</sup>.

1 This was probably so at common law even if there were words in the contract purporting to give each promisee several rights as well: see para 1083 post.

2 *Cabell v Vaughan* (1669) 1 Wms Saund 288 at 291; *Scott v Godwin* (1797) 1 Bos & P 67; *Guidon v Robson* (1809) 2 Camp 302; *Jell v Douglas* (1821) 4 B & Ald 374; *Hatsall v Griffith* (1834) 2 Cr & M 679; *Heath v Chilton* (1844) 12 M & W 632; *Hopkinson v Lee* (1845) 6 QB 964; *Pugh v Stringfield* (1857) 3 CBNS 2; *Parry v Munn* (1868) 19 LT 566; *Dix v Great Western Rly Co* (1886) 55 LJ Ch 797; *Petrie v Bury* (1824) 3 B & C 353; *Chanter v Leese* (1840) 5 M & W 698, Ex Ch; *Hirschhorn v Evans* [1938] 2 KB 801, [1938] 3 All ER 491, CA; *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, [1965] 3 All ER 764, CA; and see generally CIVIL PROCEDURE.

The non-joinder of a necessary party will not defeat an action, and the names of any parties who ought to have been joined as plaintiffs may be added by order of the court or a judge at any stage of the proceedings: RSC Ord 15 r 6.

3 *Cullen v Knowles* [1898] 2 QB 380; *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 at 654 per McNair J. One joint promisee cannot ordinarily require another joint promisee to join as plaintiff, and cannot add him as a defendant, unless he offers him an indemnity against costs (*Johnson v Stephens and Carter Ltd and Golding* [1923] 2 KB 857, CA); but a promisor cannot insist on an offer or tender of an indemnity to a joint promisee added as defendant (*Burnside v Harrison Marks Productions Ltd* [1968] 2 All ER 286, [1968] 1 WLR 782, CA).

For the situations in which a joint contractor need not be joined see para 1080 text and notes 11-18 ante.

4 *Jones v Robinson* (1847) 1 Exch 454; *Fleming v Bank of New Zealand* [1900] AC 577, PC.

5 See paras 734, 749 ante.

6 See para 1084 post.

7 Originally such an instrument had to be under seal (see para 616 ante), but in relation to instruments made after 27 July 1989 (ie the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989: see s 5) an instrument executed as a deed in accordance with s 1 (as amended) suffices: see the Law of Property Act 1925 s 81(5) (added by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(8), Sch 1 para 5).

- 8 See the Law of Property Act 1925 s 81(4).
- 9 See *ibid* s 81(1); *Josselson v Borst* [1938] 1 KB 723, [1937] 3 All ER 722, CA.
- 10 Law of Property Act 1925 s 81(3).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(1) NATURE OF JOINT AND SEVERAL PROMISES/(ii) Joint Promises/1082. Death of joint promisor or joint promisee.

### **1082. Death of joint promisor or joint promisee.**

On the death of one of the persons by whom a joint promise has been made, the general rule<sup>1</sup> is that liability devolves upon the survivors; the representatives of the deceased being under no liability<sup>2</sup>. However, when the last surviving promisor dies, the obligation passes to his estate because that obligation is necessarily several<sup>3</sup>. On the death of one of several joint promisees the right of action on the promise vests by common law in the survivors of them<sup>4</sup>. Moreover, by statute a promise by deed<sup>5</sup> to pay money to two or more persons, or to do any other act for them or for their benefit implies an obligation to perform the act to or for the benefit of the survivor or survivors of them and any other person to whom the right to sue on the contract devolves<sup>6</sup>.

1 By way of exception, even though partners are jointly liable for partnership debts, the estate of a deceased partner is also severally liable, subject to the prior payment of his separate debts: Partnership Act 1890 s 9; and see EXECUTORS AND ADMINISTRATORS; PARTNERSHIP vol 79 (2008) PARA 74.

2 *Richards v Heather* (1817) 1 B & Ald 29; *Calder v Rutherford* (1822) 3 Brod & Bing 302; *Ashbee v Pidduck* (1836) 1 M & W 564; *Richardson v Horton* (1843) 6 Beav 185; *Clarke v Bickers* (1845) 14 Sim 639; *Re Maria Anna and Steinbank Coal and Coke Co, Maxwell's Case, Hill's Case* (1875) LR 20 Eq 585; *White v Tyndall* (1888) 13 App Cas 263, HL. Quære whether this rule has been abolished by the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (as amended): see Glanville Williams *Joint Obligations* (1949) para 25.

In the administration of the estate of a deceased promisor, a promise which in form is joint only and would be so construed at law may be construed as joint and several: see *Beresford v Browning* (1875) 1 ChD 30, CA; *Levy v Sale* (1877) 37 LT 709; *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529; *Sumner v Powell* (1816) 2 Mer 30; *Kendall v Hamilton* (1879) 4 App Cas 504, HL; *Boyce v Edbrooke* [1903] 1 Ch 836; and PARTNERSHIP. As to joint and several promises see para 1083 post.

3 *Calder v Rutherford* (1883) 3 Brod & Bing 302.

4 *Martin v Crompe* (1698) 1 Ld Raym 340; *Anderson v Martindale* (1801) 1 East 497; *Jell v Douglas* (1821) 4 B & Ald 374; *Attwood v Rattenbury* (1822) 6 Moore CP 579.

5 Originally such an instrument had to be under seal (see para 616 ante), but in relation to instruments made after 27 July 1989 (ie the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989: see s 5) an instrument executed as a deed in accordance with s 1 (as amended) suffices: see the Law of Property Act 1925 s 81(5) (added by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(8), Sch 1 para 5).

6 See the Law of Property Act 1925 s 81(1).

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### (iii) Joint and Several Promises

#### 1083. Construction.

The question whether a promise made by two or more persons is (1) several; or (2) joint; or (3) both joint and several, is one of construction, and depends upon the intention of the parties as expressed in the contract<sup>1</sup>. Where several persons join in making a covenant, the rule is that the covenant is to be construed according to the ordinary meaning of the terms used by the parties, and it is not to be departed from on considerations of hardship or inconvenience<sup>2</sup>. No particular words are necessary to constitute a covenant whether it is joint or several, or both joint and several. If two persons covenant generally for themselves without any words of severance, or promise that they or one of them will do a thing, a joint liability is created; and if the covenantor's liability is to be confined to his own acts words of severalty must be added<sup>3</sup>. If, however, the terms of the covenant are ambiguous it is to be construed according to the interests of the parties; that is to say, if their interests are joint the covenant is to be construed as joint, and if their interests are several it is to be construed as imposing a several liability on each of the covenantors<sup>4</sup>.

The common law rule is that a promise cannot be made to a number of persons both jointly and severally<sup>5</sup>. In such cases, if their interests are joint the covenant will be construed as joint; and if their interests are several it will be construed as several<sup>6</sup>. This rule holds even where there is no ambiguity<sup>7</sup>, and is applied without regard to the language of the covenant, unless the terms of the covenant unequivocally showed a contrary intention<sup>8</sup>. But in any event, if a promise is made to a number of persons jointly, it would appear that any words purporting to give those persons several rights is void<sup>9</sup>.

But by statute, a covenant<sup>10</sup> made with two or more persons jointly is *prima facie* construed as being also made with each of them<sup>11</sup>; but, if this construction is excluded, it will be construed as above according to the interests of the covenantees. Furthermore, whilst at common law a purported contract made by A and B with B was void because nobody can contract with himself<sup>12</sup>, by statute such a covenant is to be construed and is capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone<sup>13</sup>.

1 *Fell v Goslin*(1852) 7 Exch 185. In certain cases, however, a remedy has been given against the assets of a deceased partner: *Kendall v Hamilton*(1879) 4 App Cas 504 at 521, HL, per Lord Hatherley. Whether a partner opening a banking account in his own name is contracting severally or as agent of the partnership is a question of fact for the court: *Cooke v Seeley*(1848) 2 Exch 746.

2 *Burns v Bryan (or Martin)*(1887) 12 App Cas 184, HL; *White v Tyndall*(1888) 13 App Cas 263 at 275, HL, per Lord Fitzgerald.

3 *White v Tyndall*(1888) 13 App Cas 263 at 269, HL, per Lord Halsbury LC; *Armstrong v Cahill* (1880) 6 LR Ir 440. Instances of covenants which have been construed as joint will be found in that case; see also *Collins v Prosser* (1823) 1 B & C 682; and *Copland v Laporte* (1835) 3 Ad & El 517. In *Mathewson's Case* (1597) 5 Co Rep 22b, and *Lee v Nixon* (1834) 1 Ad & El 201, the use of such a word as 'severally' was held to show that the liability was not joint, but several; cf *Tyser v Shipowners Syndicate (Reassured)*[1896] 1 QB 135; *General Insurance Co of Trieste v Miller, Leo Steamship Co Ltd v Corderoy* (1896) 12 TLR 395, CA. For examples of a joint and several obligation see *Duke of Northumberland v Errington* (1794) 5 Term Rep 522; *Re Smith, Fleming & Co, ex p Harding*(1879) 12 ChD 557, CA; *Sayer v Chaytor* (1699) 1 Lut 695; *Church v King* (1836) 2 My & Cr 220; *Tippins v Coates* (1853) 18 Beav 401. The liability of the partners of a firm on contracts entered into by the firm is joint, not joint and several; but the estate of a deceased partner is also severally liable on such contracts



so far as they remain unsatisfied: see the Partnership Act 1890 s 9; and PARTNERSHIP vol 79 (2008) PARA 74. As regards the administration in bankruptcy of the joint and separate estates of partners see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 817 et seq. The makers of a promissory note may be liable on it either jointly, or jointly and severally, according to the tenor of the note; but the acceptors of a bill of exchange can only be liable jointly: see the Bills of Exchange Act 1882 ss 6(2), 85; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1426. As to joint, and joint and several bonds see also *Sayer v Chaytor* (1699) Lut 695.

4 *Eccleston v Clipsham* (1668) 1 Saund 153; *Sorsbie v Park* (1843) 12 M & W 146.

5 *Slingsby's Case* (1587) 5 Co Rep 18b, Ex Ch; *Eccleston v Clipsham* (1668) 1 Saund 153; *Withers v Bircham* (1824) 3 B & C 254; *Bradburne v Botfield* (1845) 14 M & W 559. By statute, however, a promise may be deemed to be so made: see para 1081 ante. As to the performance of contract generally see para 921 et seq ante. As to the transmission of liability in the case of the death of one of the promisors see para 1082 ante; and as to the right of a joint promisor who has paid the whole amount due or more than his share of it to recover contributions from the other debtors see DAMAGES; RESTITUTION vol 40(1) (2007 Reissue) para 62 et seq.

6 *Slingsby's Case* (1587) 5 Co Rep 18b, Ex Ch; *Eccleston v Clipsham* (1668) 1 Saund 153; *Saunders v Johnson* (1693) Skin 401; *Anderson v Martindale* (1801) 1 East 497; *Southcote v Hoare* (1810) 3 Taunt 87; *Owston v Ogle* (1811) 13 East 538; *James v Emery* (1818) 8 Taunt 245, Ex Ch; *Withers v Bircham* (1824) 3 B & C 254; *Servante v James* (1829) 10 B & C 410; *Hatsall v Griffith* (1834) 2 Cr & M 679; *Place v Delegal* (1838) 4 Bing NC 426; *Poole v Hill* (1840) 6 M & W 835; *Palmer v Sparshott* (1842) 4 Man & G 137; *Foley v Addenbrooke* (1843) 4 QB 197; *Mills v Ladbroke* (1844) 7 Man & G 218; *Hopkinson v Lee* (1845) 6 QB 964; *Bradburne v Botfield* (1845) 14 M & W 559; *Wakefield v Brown* (1846) 9 QB 209; *Keightley v Watson* (1849) 3 Exch 716; *Magnay v Edwards* (1835) 13 CB 479; *Steeds v Steeds* (1889) 22 QBD 537, DC; *Haddon v Ayers* (1858) 1 E & E 118; *Palmer v Mallet* (1887) 36 ChD 411, CA; *National Society for Distribution of Electricity by Secondary Generators v Gibbs* [1900] 2 Ch 280, CA; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 263.

7 *Hopkinson v Lee* (1845) 6 QB 964.

8 *Bradburne v Botfield* (1845) 14 M & W 559. This rule of construction has no application to the case of covenants: see *White v Tyndall* (1888) 13 App Cas 263, HL.

9 *Slingsby's Case* (1587) 5 Co Rep 18b, Ex Ch.

10 Quære whether this expression includes simple contracts.

11 See the Law of Property Act 1925 s 81(1); and para 1081 ante.

12 *Mainwaring v Newman* (1800) 2 Bos & P 120; *Neale v Turton* (1827) 4 Bing 149; *Faulkner v Lowe* (1848) 2 Exch 595; *Boyce v Edbrooke* [1903] 1 Ch 836; *Ellis v Kerr* [1910] 1 Ch 529; *Napier v Williams* [1911] 1 Ch 361.

13 Law of Property Act 1925 s 82(1).

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#### **1084. Effect of joint and several promises.**

Where two or more persons make joint and several promises<sup>1</sup> to another, each of the promisors incurs both a joint and a several liability<sup>2</sup>. All or any of the promisors may be sued, at the option of the promisee, in respect of a joint and several liability, and separate actions may be brought against each<sup>3</sup>. In the event of the death of any of the promisors, the personal representatives of the deceased are liable jointly and severally with the survivors<sup>4</sup>. In the case of a joint and several continuing guarantee, on the death of one of the sureties the survivor remains liable in respect of subsequent advances until notice is given by him to determine his liability<sup>5</sup>. If a creditor makes one of two or more joint and several debtors his executor, the debt is discharged as against all the debtors<sup>6</sup>.

Moreover, whereas each of several promisees must provide consideration before he can sue on a promise<sup>7</sup>, this rule does not seem to apply to joint promisees<sup>8</sup>, nor perhaps where the promises are joint and several<sup>9</sup>.

1 For the meaning of 'joint and several promises' see para 1079 ante.

2 *King v Hoare* (1844) 13 M & W 494 at 505 (co-sureties); *Beecham v Smith* (1858) EB & E 442; *Owen v Wilkinson* (1858) 5 CBNS 526; *Re Jeffery, ex p Honey* (1871) 7 Ch App 178 (joint and several promissory notes).

3 See note 2 supra.

4 *Cock v Cross* (1672) 2 Lev 73; *Church v King* (1836) 2 My & Cr 220; *Tippins v Coates* (1853) 18 Beav 401 (joint and several liability on a bond); *Burns v Bryan (or Martin)* (1887) 12 App Cas 184, HL (lessees jointly and severally liable for rent); and see para 1078 ante. As to acknowledgment of a debt by the executor of a deceased joint debtor see *Read v Price* [1909] 2 KB 724, CA.

5 *Beckett v Addyman* (1882) 9 QBD 783, CA.

6 *Cheetham v Ward* (1797) 1 Bos & P 630; see further EXECUTORS AND ADMINISTRATORS. See also para 1065 ante.

7 All the promisees need not be joined in the action: *James v Emery* (1818) 5 Price 529; *Keightley v Watson* (1849) 3 Exch 716; *Palmer v Mallett* (1887) 36 ChD 411, CA. The doctrine of survivorship does not apply: *Withers v Bircham* (1824) 3 B & C 254.

8 See paras 734, 749, 1081 ante.

9 'A purports to make the contract on behalf of B as well as himself and the consideration supports such a contract': *McEvoy v Belfast Banking Co Ltd* [1935] AC 24 at 43, HL, obiter per Lord Atkin.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(2) DISCHARGE OF JOINT AND SEVERAL PROMISES/1085. In general.

## (2) DISCHARGE OF JOINT AND SEVERAL PROMISES

### 1085. In general.

A joint contractor may be discharged<sup>1</sup> by:

- 240 (1) performance: as where one of a number of joint, or joint and several, debtors pays a debt<sup>2</sup> or a judgment debt<sup>3</sup>;
- 241 (2) death: where one joint contractor dies, his obligation generally ceases and does not pass to his personal representatives<sup>4</sup> but instead the whole obligation passes to the surviving joint promisors<sup>5</sup>; but, where the last joint promisor dies, the obligation becomes several and passes to his personal representatives<sup>6</sup>. Where the obligation was initially joint and several, the personal representatives of the deceased are liable jointly and severally with the survivors<sup>7</sup>;
- 242 (3) release or accord and satisfaction: whether the liability be joint, or joint and several, a joint contract will generally be discharged where the promisee<sup>8</sup> discharges one promisor by release made by deed<sup>9</sup> or by accord and satisfaction<sup>10</sup>;
- 243 (4) grant of time to a surety: in the case of a joint contract of surety, there is a special rule<sup>11</sup> that all the sureties will generally be discharged by an agreement by the creditor to give time to the principal debtor<sup>12</sup>;
- 244 (5) an unauthorised material alteration of a contractual document<sup>13</sup>;
- 245 (6) a joint promisor becoming executor of his promisee<sup>14</sup>;
- 246 (7) limitation of action generally<sup>15</sup>.

1 For the discharge of contractual obligations generally see para 920 et seq ante. For the discharge of joint obligations under a bond see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 137. The discharge in bankruptcy of one joint, or joint and several, debtor does not discharge the others: see the Insolvency Act 1986 s 281(7); para 1067 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 644.

2 See para 1086 post. As to payment generally see para 942 et seq ante.

3 As to payment of joint debts see para 1086 post.

4 See generally para 1082 ante. As to the exception in the case of partnerships see para 1082 note 1 ante.

5 See para 1082 ante.

6 See para 1082 ante.

7 See para 1084 ante.

8 Or one of a number of joint promisees; but contra where there is a covenant not to sue (see para 1088 post). As to the rights of joinder of joint promisees see para 1081 ante.

9 See para 1089 post. However, this is not the case where there is merely a covenant not to sue: see para 1089 text and note 2 post.

10 See para 1090 post.

11 For a general discussion of the ways in which a surety may be discharged see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1189 et seq.

12 See *Combe v Woolf* (1832) 8 Bing 156; *Bank of Montreal v Dobbin and Dobbin* [1996] 5 Bank LR 190, New Bruns CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1224 et seq.

13 See para 1091 post.

14 See para 1084 text and note 6 ante.

15 Where joint, or joint and several, promisors are protected by the limitation rules, normally the fact that one promisor takes himself outside the protection of those statutory rules by acknowledging the debt does not prevent the other promisors from pleading limitation (see the Limitation Act 1980 s 31(6); and LIMITATION PERIODS vol 68 (2008) PARA 1217); but, by way of exception, all the promisors will be bound where there is: (1) an acknowledgment made with their authority as agent for them (see s 30(2)); or (2) a part payment is made before the expiration of the limitation period (see s 31(7)). See generally para 1074 ante; and LIMITATION PERIODS.

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### **1086. Payment of joint debts.**

Payment<sup>1</sup> to one of a number of joint<sup>2</sup> creditors discharges a debt owed to them jointly<sup>3</sup>. Payment by one of joint, or joint and several, debtors discharges all<sup>4</sup>, though it may give rise to a right of contribution among them<sup>5</sup>.

Whether a compromise of a claim against one of joint and several debtors discharges the others depends on the construction of the compromise<sup>6</sup>.

1 As to payment generally see para 942 et seq ante.

2 Presumably, the same applies to payment to one of joint and several creditors; cf para 1083 text and note 5 ante.

3 *Wallace v Kelsall* (1840) 7 M & W 264; *Husband v Davis* (1851) 10 CB 645; *Steeds v Steeds* (1889) 22 QBD 537, DC; *Powell v Brodhurst* [1901] 2 Ch 160; cf *Stone v Marsh* (1827) 6 B & C 551.

As to discharge by payment of a bond to two or more obligees see *Powell v Brodhurst* [1901] 2 Ch 160; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 137. As to payment to one of two or more trustees see *Husband v Davis* supra; and TRUSTS vol 48 (2007 Reissue) para 1051. As to payment to one executor or administrator see *Can v Read* (1749) 3 Atk 695; and EXECUTORS AND ADMINISTRATORS. As to payment to one partner see *Moore v Smith* (1851) 14 Beav 393; and PARTNERSHIP. See also the decisions as to the effect of an accord and satisfaction with one of the joint creditors cited in para 1090 note 2 post; and as to a release granted by one of them see para 1088 post.

4 *Beaumont v Greathead* (1846) 2 CB 494; *Thorne v Smith* (1851) 10 CB 659; *Re EWA* [1901] 2 KB 642, CA. See also the decisions as to the effect of an accord and satisfaction effected by one of joint, or joint and several, debtors cited in para 1090 post; and as to a release granted to one of them see para 1089 post.

5 See DAMAGES; RESTITUTION vol 40(1) (2007 Reissue) para 62 et seq.

6 See paras 1089-1090 post.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(2) DISCHARGE OF JOINT AND SEVERAL PROMISES/1087. Judgment against one joint debtor.

### **1087. Judgment against one joint debtor.**

Judgment recovered against any person liable<sup>1</sup> in respect of any debt<sup>2</sup> or damage is not a bar<sup>3</sup> to an action<sup>4</sup>, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage<sup>5</sup>.

Where the writ of summons is indorsed for a liquidated demand, and of a number of defendants one or more appear to the writ and another or others of them fail to give notice of intention to defend, the plaintiff may enter final judgment against such as have not given notice, and proceed with the action against the other defendants<sup>6</sup>. Where the claim is for unliquidated damages, the plaintiff may enter interlocutory judgment against the defendants who have failed to give notice of intention to defend and proceed with his action against the others<sup>7</sup>. Where one or more of the defendants fails to serve a defence, the plaintiff may enter final judgment (if his claim is for a liquidated demand) or interlocutory judgment (if the claim is for unliquidated damages) against such defendants without prejudice to his right to proceed against the other defendants<sup>8</sup>; and where, on an application for summary judgment, one or more of the defendants obtains leave to defend the action and another or others do not, the plaintiff is entitled to enter final judgment against the latter without prejudice to his right to proceed with his action against the former<sup>9</sup>.

1 A person is liable in respect of any damage for these purposes if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise): Civil Liability (Contribution) Act 1978 s 6(1).

2 Nothing in the Civil Liability (Contribution) Act 1978 affects any case where the debt in question became due or (as the case may be) the damage in question occurred before 1 January 1979 (ie the date on which the Act came into force): ss 7(1), 10(2). As to the position at common law prior to that date see notes 3-4 infra.

3 At common law, as a general rule a judgment recovered against one or more of a number of joint debtors barred an action against the others, even if the creditor did not know of their existence at the time when the first action was brought, and even if the judgment was not satisfied: *King v Hoare* (1844) 13 M & W 494; *Kendall v Hamilton* (1879) 4 App Cas 504, HL. The rule applied equally whether the joint debtors were sued together or in separate actions, and whether judgment was obtained by consent or otherwise: *McLeod v Power* [1898] 2 Ch 295. The plaintiff could not evade the rule by having the judgment set aside with the consent of the debtor against whom it was obtained: *Hammond v Schofield* [1891] 1 QB 453, DC. The rule had no application in cases where the liability of the debtors was several as well as joint: see *Blumfield's Case* (1596) 5 Co Rep 86b; *Higgen's Case* (1605) 6 Co Rep 44b; *Ayrey v Davenport* (1807) 2 Bos & PNR 474; *Lechmere v Fletcher* (1833) 1 Cr & M 623; *King v Hoare* (1844) 13 M & W 494; *Re Davison, ex p Chandler* (1884) 13 QBD 50; *Blyth v Fladgate* [1891] 1 Ch 337.

However, there were a number of exceptions to this rule at common law, whereby the judgment was no bar to an action against a joint debtor, eg (1) where the second action was not in respect of an identical cause of action (*Drake v Mitchell* (1803) 3 East 251; *Wegg Prosser v Evans* [1895] 1 QB 108, CA); (2) where a partner died, actions might be brought against the surviving partners as well as against the estate of the deceased partner (*Liverpool Borough Bank v Walker* (1859) 4 De G & J 24; *Re Outram, ex p Ashworth and Outram* (1893) 63 LQB 308; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA); (3) where the defendant being sued agreed to the judgment being taken against the first defendant and agreed that his own liability should remain until that judgment was satisfied (*Duffner v Bowyer* (1924) 40 TLR 700).

4 'Action' means an action brought in England and Wales: Civil Liability (Contribution) Act 1978 s 6(4).

5 Ibid s 3; and see DAMAGES.

6 See RSC Ord 13 r 1; *Pim v Coyle* [1903] 2 IR 457; and CIVIL PROCEDURE.

- 7 See RSC Ord 13 r 2; and CIVIL PROCEDURE.
- 8 See RSC Ord 19 rr 2, 3; and CIVIL PROCEDURE.
- 9 See RSC Ord 14 r 8; and and CIVIL PROCEDURE.

## **UPDATE**

### **1087 Judgment against one joint debtor**

TEXT AND NOTES--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR').  
See generally CIVIL PROCEDURE.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(2) DISCHARGE OF JOINT AND SEVERAL PROMISES/1088. Release by one joint creditor.

### **1088. Release by one joint creditor.**

A release<sup>1</sup> given by one of a number of joint creditors discharges the debt as against all of them<sup>2</sup>, and a partner has implied authority to release any debt due to the firm so as to bind his co-partners<sup>3</sup>; but a debtor will not be allowed to set up a release obtained by him from one of a number of joint creditors in fraud of the others<sup>4</sup>, nor will a merely nominal plaintiff be permitted to release the cause of action without the consent of the person beneficially interested<sup>5</sup>.

A covenant by one of a number of joint creditors not to sue the debtor does not discharge the debt as against the other joint creditors<sup>6</sup>.

1 As to release see para 1052 et seq ante.

2 *Ruddock's Case* (1599) 6 Co Rep 25a; *Arton v Booth* (1820) 4 Moore CP 192; *Wallace v Kelsall* (1840) 7 M & W 264; *Wild v Williams* (1840) 6 M & W 490; *Jones and Matthews v Herbert* (1817) 7 Taunt 421; *Wilkinson v Lindo* (1840) 7 M & W 81. But see *Haddon v Ayers* (1858) 1 E & E 118; *Palmer v Sparshott* (1842) 4 Man & G 137; and *Steeds v Steeds* (1889) 22 QBD 537, DC; explained in *Powell v Brodhurst* [1901] 2 Ch 160. See also the decisions as to the effect of an accord and satisfaction with one of several joint creditors or payment to one of them in paras 1086 ante, 1090 post.

3 *Perry v Jackson* (1792) 4 Term Rep 516 at 519; *Hawkshaw v Parkins* (1819) 2 Swan 539; *Furnival v Weston* (1822) 7 Moore CP 356. See also PARTNERSHIP.

4 *Innell v Newman* (1821) 4 B & Ald 419; *Barker v Richardson* (1827) 1 Y & J 362; *Wild v Williams* (1840) 6 M & W 490; *Phillips v Clagett* (1843) 11 M & W 84; *Rawstorne v Gandell* (1846) 15 M & W 304; *Piercy v Fynney* (1871) LR 12 Eq 69; *Jones and Matthews v Herbert* (1817) 7 Taunt 421; *Arton v Booth* (1820) 4 Moore CP 192; *Furnival v Weston* (1822) 7 Moore CP 356. See also *Mountstephen v Brooke* (1819) 1 Chit 390.

5 *Hickey v Burt* (1816) 7 Taunt 48; *Innell v Newman* (1821) 4 B & Ald 419.

6 *Walmsley v Cooper* (1839) 11 Ad & El 216. As to covenants not to sue see para 1053 ante.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(2) DISCHARGE OF JOINT AND SEVERAL PROMISES/1089. Release of one joint debtor.

### **1089. Release of one joint debtor.**

A release given to one of a number of persons who is jointly, or jointly and severally, liable discharges the others<sup>1</sup>. However, if the intention of the creditor was to reserve his rights against the other persons liable on the contract, such release will be treated as a covenant not to sue<sup>2</sup> and will not discharge the others<sup>3</sup>. Where one joint debtor is released by a deed which does not reserve the rights of the creditor against the others, oral evidence is not admissible to prove an agreement that the others would remain liable notwithstanding the release, for such evidence would contradict the written instrument<sup>4</sup>.

<sup>1</sup> *North v Wakefield* (1849) 13 QB 536; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177 at 188, CA; *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541; *Cheetham v Ward* (1797) 1 Bos & P 630; *Nicholson v Revill* (1836) 4 Ad & El 675; *Re EWA* [1901] 2 KB 642, CA; *Deanplan Ltd v Mahmoud* [1993] Ch 151, [1992] 3 All ER 945.

A scheme of arrangement sanctioned by the court under the Companies Act 1985 s 425 (as amended) does not release a joint, or joint and several, debtor with the company since it creates a discharge by operation of law: *Re Garner's Motors Ltd* [1937] Ch 594, [1937] 1 All ER 671 (decided on the Companies Act 1929 s 153 (repealed)); and see COMPANIES vol 15 (2009) PARA 1432. However, a term in a voluntary arrangement under the Insolvency Act 1986 s 260(2) releasing a debtor could have the effect of releasing a jointly liable co-debtor; but whether it does so is a matter of construction, having regard to the surrounding circumstances and taking into account any terms which could properly be implied: see *Johnson v Davies* [1998] 2 All ER 649, CA.

It is perhaps curious that a release should discharge the other parties where the obligation is joint and several; cf para 1087 ante; and see para 1090 note 3 post.

<sup>2</sup> See *Watts v Aldington, Tolstoy v Aldington* (1993) Times, December 16, CA; *Kenworthy v Avoth Holdings Pty Ltd* [1975] Abr para 549; and para 1053 ante. The distinction between a release and a covenant not to sue was made for this purpose, since it was originally thought that the rule whereby a joint, or a joint and several, obligation created a single obligation could not be denied by agreement between the parties. Accordingly, when it came to be recognised that effect should be given to a creditor's intention to release only one joint debtor, it was felt necessary to use a different name for the instrument of discharge.

For the distinction between a release and a covenant not to sue in relation to joint tortfeasors see *Duck v Mayeu* [1892] 2 QB 511, CA; and TORT.

<sup>3</sup> *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC; *Dean v Newhall* (1799) 8 Term Rep 168; *Hutton v Eyre* (1815) 6 Taunt 289; *Solly v Forbes* (1820) 2 Brod & Bing 38; *North v Wakefield* (1849) 13 QB 536; *Price v Barker* (1855) 4 E & B 760; *Willis v De Castro* (1858) 4 CBNS 216; *Bateson v Gosling* (1871) LR 7 CP 9; *Duck v Mayeu* [1892] 2 QB 511, CA; *Rice v Reed* [1900] 1 QB 54 at 67, CA, per Vaughan Williams LJ. As to the effect of a release granted to a principal debtor where the creditor reserves his rights against the surety see *Kearsley v Cole* (1846) 16 M & W 128; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

Where the other debtors remain liable their rights of contribution against the discharged debtor are not necessarily removed, though the effect of those rights may be effectually nullified by the discharge: *Mallet v Thompson* (1804) 5 Esp 178; cf *Re Lewis, ex p Smith* (1789) 3 Bro CC 1. As to contribution among joint, or joint and several, debtors see DAMAGES; RESTITUTION vol 40(1) (2007 Reissue) para 62 et seq.

<sup>4</sup> *Cocks v Nash* (1832) 9 Bing 341; *Brooks v Stuart* (1839) 9 Ad & El 854. As to extrinsic evidence see paras 622, 690-700 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185 et seq.

## **UPDATE**

### **1089 Release of one joint debtor**

NOTE 1--Companies Act 1985 s 425 replaced by various provisions of Companies Act 2006. As to schemes of arrangement see COMPANIES vol 15 (2009) PARA 1425 et seq.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(2) DISCHARGE OF JOINT AND SEVERAL PROMISES/1090. Accord and satisfaction.

### **1090. Accord and satisfaction.**

Accord and satisfaction<sup>1</sup> effected with one of a number of joint creditors discharges the joint debt<sup>2</sup>. Accord and satisfaction between the creditor and one of a number of joint, or joint and several, debtors discharges the other debtors unless it appears from the terms of the agreement or the surrounding circumstances that the creditor intended to reserve his rights against them<sup>3</sup>. This rule applies whether the obligation arises on a judgment or any other debt<sup>4</sup>. The taking of the bill or note of one joint debtor in satisfaction furnishes consideration for the discharge of the others<sup>5</sup>, for, it has been said, the sole liability of one may be more beneficial to the creditor than the original joint liability<sup>6</sup>.

1 As to accord and satisfaction in general see para 1043 et seq ante.

2 *Wallace v Kelsall* (1840) 7 M & W 264; *Steeds v Steeds* (1889) 22 QBD 537, DC. For the application of this principle to payments to a partner see *Powell v Brodhurst* [1901] 2 Ch 160; and PARTNERSHIP. However, where mortgagees have advanced money on a joint account, payment to one of them during the others' lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest, if any, even though the payee ultimately becomes the survivor in the joint account: *Powell v Brodhurst* [1901] 2 Ch 160; see further MORTGAGE.

3 *Watters v Smith* (1831) 2 B & Ad 889; *Nicholson v Revill* (1836) 4 Ad & El 675; *Ex p Good, Re Armitage* (1877) 5 ChD 46; *Re EWA* [1901] 2 KB 642, CA; *Deanplan Ltd v Mahmoud* [1993] Ch 151, [1992] 3 All ER 945; *Watts v Aldington, Tolstoy v Aldington* (1993) Times, December 16, CA; cf *Ex p Gifford* (1802) 6 Ves 805; *Hutton v Eyre* (1815) 6 Taunt 289; *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541.

Since a joint and several obligation is regarded at common law at one and the same time as a joint obligation and a number of separate obligations (see para 1079 ante) it is perhaps surprising that an accord and satisfaction with one debtor releases the others. Where a composition with creditors is made, the acceptance of the composition by a creditor does not release the debtor's partner, co-trustee, joint promisor or surety: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 859 et seq. As to voluntary arrangements with creditors see the Insolvency Act 1986 ss 252-263; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 81 et seq.

4 *Re EWA* [1901] 2 KB 642, CA.

5 This is so if the bill or note is for the full amount of the debt (as in the cases cited in note 6 infra). What is less certain is the effect of the note of one joint debtor for a lesser amount; it will clearly not discharge his liability (see para 1045 text and note 15 ante), but what of the liability of the others? Cf para 1045 note 23 ante.

6 *Thompson v Percival* (1834) 5 B & Ad 925; *Lyth v Ault* (1852) 7 Exch 669, explaining *Lodge v Dicus* (1820) 3 B & Ald 611. The following might constitute benefits to the creditor: (1) where a joint contracting party dies, no liability on the contract passes to his estate (unless he is the last surviving joint contractor); thus, it might be more advantageous to have the sole liability of one claimworthy contractor than the joint liability of two contracting parties only one of whom was claimworthy; (2) in a case of joint liability, the plaintiff should sue all persons jointly liable and if he does not do so any person who is sued may apply to stay the action until the other persons liable are added as defendants: see RSC Ord 15 r 4; and CIVIL PROCEDURE.

## **UPDATE**

### **1090 Accord and satisfaction**

NOTE 2--Such a discharge is not negated by the Civil Liability (Contribution) Act 1978 s 3: *Morris v Wentworth-Stanley* [1999] 2 WLR 470, CA.

NOTE 6--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. JOINT AND SEVERAL PROMISES/(2) DISCHARGE OF JOINT AND SEVERAL PROMISES/1091. Material alteration.

**1091. Material alteration.**

The rules as to discharge of a contractual obligation by unauthorised material alteration<sup>1</sup> apply equally to joint, or joint and several, promises. Thus it has been held that if a joint promissory note is made joint and several without the consent of one maker he is discharged therefrom<sup>2</sup>; and similarly a party to a joint and several promissory note was discharged when a new party was added to it without the consent of the existing party<sup>3</sup>.

1 See para 1056 et seq ante.

2 *Perring v Hone* (1826) 4 Bing 28.

3 *Gardner v Walsh* (1855) 5 E & B 83. As to material alterations to bills and notes see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1560. As to the effect of removal of a seal from a deed where a number of parties are jointly, or jointly and severally, bound see *Collins v Prosser* (1823) 1 B & C 682; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 138.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/9. RESTITUTION

**9.**

**1092-1169 Restitution**

The material contained in Part 9 can now be found in RESTITUTION vol 40(2) (2007 Reissue).

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1170. Contracts made by an employee under express authority.

## 10A.

### 1170. Contracts made by an employee under express authority.

Where an employee, acting under his employer's express instructions<sup>1</sup>, enters into a contract with a third person the employer is liable to the third person upon the contract provided the employee, in making the contract, has strictly observed the tenor of his instructions<sup>2</sup>. If, therefore, without his employer's knowledge, the employee departs from his instructions<sup>3</sup> and makes a contract different from that which he was in fact authorised to make, the employer is not liable merely because of the existence of the original authority<sup>4</sup>. Thus, an employee who is authorised to buy goods on behalf of his employer must, in the absence of circumstances pointing to a contrary conclusion<sup>5</sup>, buy them for cash<sup>6</sup>; he cannot, therefore, unless authorised to do so, render the employer liable to pay for them by buying them on credit<sup>7</sup>. Even the fact that the employer takes the benefit of his employee's contract does not necessarily impose any liability upon the employer under it, since he may be unaware that the contract, the benefit of which he takes, differs in its terms from the contract which he authorised<sup>8</sup>. If, therefore, he has arranged that the employee is to pay for the goods himself<sup>9</sup>, or if he has given the employee the money to pay for them<sup>10</sup>, the employee's failure to pay for the goods in accordance with his instructions does not of itself render the employer liable, even though the goods are in fact used for the employer's purposes<sup>11</sup>. Where, however, the contract is capable of severance, the employer remains liable to the extent to which the contract, as actually made, is in accordance with his instructions, though his liability extends no further<sup>12</sup>.

<sup>1</sup> An act done under express instructions must be distinguished from an act done within the scope of the employee's general authority: see PARAS 1124-1126, and AGENCY vol 1 (2008) PARA 30.

<sup>2</sup> *Metcalfe v Lumsden* (1844) 1 Car & Kir 309; *Helyear v Hawke* (1803) 5 Esp 72; cf *Hambro v Burnand* [1904] 2 KB 10, CA; *Gretton v Mees* (1878) 7 Ch D 839. See generally AGENCY vol 1 (2008) PARA 121 et seq.

<sup>3</sup> *Collen v Gardner* (1856) 21 Beav 540.

<sup>4</sup> *Acey v Fernie* (1840) 7 M & W 151. An employer who employs an illiterate employee to enter into a contract which necessarily involves the signing of a written document will be bound by what the employee signs: see *Forenian v Great Western Rly Co* (1878) 38 LT 851.

<sup>5</sup> *Maunder v Conyers* (1817) 2 Stark 281; *Summers v Solomon* (1857) 7 E & B 879.

<sup>6</sup> *Wright v Glyn* [1902] 1 KB 745, CA; *Rusby v Scarlett* (1803) 5 Esp 76; *Stubbing v Heintz* (1791) Peake 47.

<sup>7</sup> *Maunder v Conyers* (1817) 2 Stark 281; *Stubbing v Heintz* (1791) Peake 47; *Pearce v Rogers* (1800) 3 Esp 214. The same principle applies when the employee is authorised to sell goods on his employer's behalf (*Kaye v Brett* (1850) 5 Exch 269; *Curlewis v Birkbeck* (1863) 3 F & F 894; *Howard v Chapman* (1831) 4 C & P 508); or to receive payment (*Thorold v Smith* (1706) 11 Mod Rep 87; cf *Barrett v Deere* (1828) Mood & M 200; *Williams v Goodwin* (1826) 2 C & P 257). An employee who is authorised to receive payment by cheque may take a cheque payable to himself, provided that it is honoured: *Walker v Barker* (1900) 16 TLR 393; cf *Hogarth v Wherley* (1875) LR 10 CP 630. Tender of payment to an employee, although he has orders not to accept, has been held to be sufficient (*Moffat v Parsons* (1814) 5 Taunt 307); but where the employee at the time of tender disclaims authority to accept it has been held to be insufficient: *Bingham v Allport* (1833) 2 LJB 86; see also *Finch v Boning* (1879) 4 CPD 143.

<sup>8</sup> If, however, the employer takes the benefit of his employee's contract with knowledge of the facts, his conduct amounts to a ratification of the contract as made: *Bristowe v Whitmore* (1861) 9 HL Cas 391.

9 *Wright v Glyn*[1902] 1 KB 745, CA, commenting on *Precious v Abel* (1795) 1 Esp 350, and *Rimell v Sampayo* (1824) 1 C & P 254.

10 *Rusby v Scarlett* (1803) 5 Esp 76; *Miller v Hamilton* (1832) 5 C & P 433. It is otherwise, however, where the employer authorises the employee to buy on credit and the employee misappropriates the money which the employer afterwards gives him to pay with: *Rusby v Scarlett* supra.

11 *Stubbing v Heintz* (1791) Peake 47; *Maunder v Conyers* (1817) 2 Stark 281; *Pearce v Rogers* (1800) 3 Esp 214.

12 *Hunter v Countess Dowager of Berkeley* (1836) 7 C & P 413, where the defendant was also held entitled to set off a previous payment made under a contract which had been varied without her knowledge; cf *Marchioness of Bute v Mason, ex p Heard* (1849) 7 Moo PCC 1.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1171. When authority is implied.

**1171. When authority is implied.**

The employer is not, in principle, liable upon contracts entered into by his employee without express authority, since the relation of employer and employee does not in itself confer on the employee an implied authority to bind his employer<sup>1</sup>. An authority to bind the employer may, however, be implied from the circumstances of the particular case, and the employer is then liable notwithstanding that the employee disobeyed his instructions<sup>2</sup>.

<sup>1</sup> *Hiscox v Greenwood* (1802) 4 Esp 174; *Maunder v Conyers* (1817) 2 Stark 281; *Waters v Brogden* (1827) 1 Y & J 457. The employer is not in any event liable if the third person looked exclusively to the employee: *Williamson v Barton* (1862) 7 H & N 899. As to acts within the apparent scope of the employee's authority, see PARAS 1175-1178.

<sup>2</sup> See *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 78, [1972] 3 All ER 101, HL. See also PARAS 1175-1178; and AGENCY vol 1 (2008) PARA 37. No authority to pledge the employer's credit is to be implied from the mere necessity of the case: see *Hawtayne v Bourne* (1841) 7 M & W 595, where money was borrowed for the purpose of preventing a distress; and AGENCY vol 1 (2008) PARA 37. As to the position where money borrowed has been applied for the employer's benefit, see *Bannatyne v MacIver* [1906] 1 KB 103, CA; and AGENCY vol 1 (2008) PARA 124.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT:  
CONTRACTUAL LIABILITIES TO THIRD PERSONS/1172. Estoppel.

**1172. Estoppel.**

Where the employer is aware that the employee is making a particular contract on his behalf and does not interfere, he is precluded from afterwards denying that the employee had no authority to make the contract in question, since he has by his conduct held out his employee to the person with whom the contract is made as having authority to make it<sup>1</sup>.

<sup>1</sup> See AGENCY vol 1 (2008) PARA 25. As to estoppel by conduct, see ESTOPPEL vol 16(2) (Reissue) PARA 1058 et seq.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1173. Ratification.

### **1173. Ratification.**

Where an unauthorised contract made by an employee is afterwards ratified by the employer with knowledge of its terms, he is liable upon it<sup>1</sup>. He cannot, after ratification, rely either upon the defence that the employee had no authority to contract on his behalf<sup>2</sup>, or upon the defence that the employee departed from his instructions and made a contract differing from that which he was authorised to make<sup>3</sup>.

If an employee, authorised to buy goods on the employer's behalf, buys them, in excess of his authority, on credit, the employer's retention of the goods in ignorance of the fact that his credit was pledged cannot be treated as a ratification<sup>4</sup>, but where the employer has cause to suspect the employee's honesty and has refrained from making full inquiry he must be presumed to have ratified the employee's dishonest acts<sup>5</sup>.

<sup>1</sup> *Bristowe v Whitmore* (1861) 9 HL Cas 391. He may also enforce it: *Foster v Bates* (1843) 12 M & W 226. As to ratification generally, see AGENCY vol 1 (2008) PARA 57 et seq.

<sup>2</sup> Cf *Bird v Brown* (1880) 4 Exch 786.

<sup>3</sup> *Bristowe v Whitmore* (1861) 9 HL Cas 391.

<sup>4</sup> *Wright v Glyn* [1902] 1 KB 745, CA; *Rusby v Scarlett* (1803) 5 Esp 76; *Stubbing v Heintz* (1791) Peake 47; *Maunder v Conyers* (1817) 2 Stark 281; *Pearce v Rogers* (1800) 3 Esp 214.

<sup>5</sup> *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT:  
CONTRACTUAL LIABILITIES TO THIRD PERSONS/1174. Employer's conduct.

**1174. Employer's conduct.**

Where an employer from time to time allows his employee to make contracts of a particular class on his behalf without express authority, or ratifies them when made, without notifying the person with whom they were made of the fact that they were made without authority, the employer's conduct may amount to a representation to that person that the employee has authority to make contracts of that class on the employer's behalf<sup>1</sup>.

<sup>1</sup> *Hazard v Treadwell* (1722) 1 Stra 506; *Todd v Robinson* (1825) Ry & M 217; cf *Spooner v Browning* [1898] 1 QB 528, CA, where it was held on the facts that there had been no holding out by the employer; *Farquharson Bros & Co v G King & Co* [1902] AC 325, HL; and see AGENCY vol 1 (2008) PARA 25. As to estoppel by conduct see ESTOPPEL vol 16(2) (Reissue) PARA 1058 et seq.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT:  
CONTRACTUAL LIABILITIES TO THIRD PERSONS/1175. Apparent scope of employee's authority.

### **1175. Apparent scope of employee's authority.**

Where an employee, while acting in the ordinary course of his employment on his employer's behalf, makes a contract which falls within the apparent scope of his authority, the employer cannot escape liability on the ground that he did not authorise the making of the contract<sup>1</sup>, nor even on the ground that he forbade his employer to make it<sup>2</sup>. All persons dealing with the employee are entitled to assume, unless they have notice to the contrary<sup>3</sup>, that he possesses the authority which it is usual for an employee in his position to possess<sup>4</sup>, and his employer, by placing him in that position, impliedly holds him out as having such authority<sup>5</sup>. Where it is sought upon this ground to fix the employer with liability upon his employee's contract it is necessary to take into consideration certain matters, namely the nature of the contract, the circumstances of the employee's employment and the employer's business<sup>6</sup>.

<sup>1</sup> *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 78, [1972] 3 All ER 101, HL; see also *Richardson v Cartwright* (1844) 1 Car & Kir 328; *Nickson v Brohan* (1712) 10 Mod Rep 109; *Smith v Hull Glass Co* (1852) 11 CB 897; *Smith v M'Guire* (1858) 3 H & N 554 at 562 (principal liable for contracts of general agent though agent exceeds instructions).

<sup>2</sup> *Edmunds v Bushell and Jones* (1865) LR 1 QB 97 (principal employed agent to carry on business; business carried on in agent's name; agent forbidden by principal to accept bills of exchange; principal liable on bill accepted by agent); *Page v Great Northern Rly Co* (1868) IR 2 CL 228 (cattle booked by railway company's clerk before their delivery in company's yard, although clerk had express instructions not to book cattle before delivery; company liable for delay in forwarding cattle despite irregularity of clerk in booking them); cf *Montaignac v Shitta* (1890) 15 App Cas 357, PC (where the authority was only to be exercised in certain circumstances); *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 78, [1972] 3 All ER 101, HL; and see AGENCY vol 1 (2008) PARA 37.

<sup>3</sup> *Jordan v Norton* (1838) 4 M & W 155; cf *International Sponge Importers Ltd v Andrew Watt & Sons* [1911] AC 279, HL.

<sup>4</sup> *Watteau v Fenwick* [1893] 1 QB 346; *Richardson v Cartwright* (1844) 1 Car & Kir 328; *Smith v Hull Glass Co* (1852) 11 CB 897; *Howard v Sheward* (1866) LR 2 CP 148; cf *Barrett v Deere* (1828) Mood & M 200.

<sup>5</sup> *Miller v Hamilton* (1832) 5 C & P 433; *Brooks v Hassall* (1883) 49 LT 569 (with which contrast *Brady v Todd* (1861) 9 CBNS 592); *Real and Personal Advance Co v Phalempin* (1893) 9 TLR 569, CA.

<sup>6</sup> See PARAS 1176, 1177.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1176. Nature of contract and circumstances of employment.

### **1176. Nature of contract and circumstances of employment.**

In order that a contract may fall within the apparent scope of the employee's authority the contract must be one the making of which is incidental to the duties which the employee is employed to perform<sup>1</sup>. The same tests are to be applied as for the purpose of determining the responsibility of a principal for the acts of his agent, although the tests might produce different results in the case of an employee<sup>2</sup>.

The implied authority of an employee must, as a matter of course, vary according to the nature of his employment, and need not necessarily include an authority to contract at all. Employees are of different grades, and the authority to be implied in the case of one may be more extensive than in the case of another holding a more subordinate position<sup>3</sup>. The employee may be employed to perform a particular duty only, in which case he has no general authority to bind his employer by contract<sup>4</sup>. If the making of a particular class of contracts is incidental to the duty which he is employed to perform, any contract of that class will bind his employer on the ground that an authority to make it is to be implied from the nature of his employment<sup>5</sup>. Where, however, the contract belongs to a different class, the employer is not liable, since his employee is no longer acting in the course of his employment; and has therefore no implied authority to make it<sup>6</sup>. If, on the other hand, the employee is given a general authority to conduct his employer's business, his authority is wider in its scope, and the employer will be liable upon all contracts made by the employee in the ordinary course of business<sup>7</sup>.

1 *Richardson v Cartwright* (1844) 1 Car & Kir 328; *Graves v Masters* (1883) Cab & El 73; *Smith v Hull Glass Co* (1852) 11 CB 897; *Real and Personal Advance Co v Phalempin* (1893) 9 TLR 569, CA; cf *Sanderson v Bell* (1833) 2 Cr & M 304; *Lucas v Mason* (1875) LR 10 Exch 251.

2 *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 78, [1972] 3 All ER 101, HL; and see AGENCY vol 1 (2008) PARA 37.

3 *Contrast Walker v Great Western Rly Co* (1867) LR 2 Exch 228, with *Cox v Midland Counties Rly Co* (1849) 3 Exch 268; and cf *Langan v Great Western Rly Co* (1873) 30 LT 173, Ex Ch; and see *Leckenby v Wolman* [1921] WN 100, where a salesman, employed at £3 per week and 1 1/4 per cent commission on sales effected by him, was held not to be authorised to cancel sales made by him on behalf of his employer.

4 *Cox v Midland Counties Rly Co* (1849) 3 Exch 268; see also *Houghton v Pilkington* [1912] 3 KB 308, DC.

5 *Richardson v Cartwright* (1844) 1 Car & Kir 328. The fact that the employer has previously ratified similar contracts made by employees holding similar positions to that of the employee in question is evidence of the employee's authority: *Cox v Midland Counties Rly Co* (1849) 3 Exch 268; cf *Thorold v Smith* (1706) 11 Mod Rep 87.

6 *Hawtayne v Bourne* (1841) 7 M & W 595; *Linford v Provincial Horse and Cattle Insurance Co* (1864) 34 Beav 291; *Reynolds v Jex* (1865) 7 B & S 86; *A-G v Jackson* (1846) 5 Hare 355; *Re Southport and West Lancashire Banking Co* (1885) 1 TLR 204, CA; *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532; cf *A-G v Briggs, A-G v Birmingham and Oxford Junction Rly Co* (1855) 1 Jur NS 1084.

7 *Fenn v Harnson* (1790) 3 Term Rep 757 at 760; *East India Co v Hensley* (1794) 1 Esp 112; *Walker v Great Western Rly Co* (1867) LR 2 Exch 228; *Smith v Hull Glass Co* (1852) 11 CB 897; *Myers v Willis* (1856) 18 CB 886, Ex Ch; *Summers v Solomon* (1857) 7 E & B 879; *Totterdell v Fareham Blue Brick and Tile Co Ltd* (1866) LR 1 CP 674; *Sandeman v Scurr* (1866) LR 2 QB 86; *Geake v Jackson* (1867) 36 LJCP 108; *Beer v London and Paris Hotel Co* (1875) LR 20 Eq 412; *Watteau v Fenwick* [1893] 1 QB 346, with which contrast *Daun v Simmins* (1879) 41 LT 783, CA, where the employee's authority was limited by usage.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1177. Nature of employer's business.

**1177. Nature of employer's business.**

In determining whether a contract falls within the apparent scope of the employee's authority<sup>1</sup> the employer's business must also be taken into consideration, since all employees employed to perform the same duty do not necessarily possess the same implied authority. Thus, an employee who is employed to sell goods on behalf of his employer has no implied authority to give a warranty if his employer is a private person<sup>2</sup>, although if his employer is a dealer a warranty given by his employee will bind the employer, even though given contrary to his express instructions<sup>3</sup>. Where, however, the employer carries on a particular business, it is to be presumed that his employees possess the authority usually possessed by other employees in a similar position in the same kind of business<sup>4</sup>.

<sup>1</sup> For the principle that an employer is liable on a contract within the apparent scope of his employee's authority, see PARA 1175.

<sup>2</sup> *Brady v Todd* (1861) 9 CBNS 592; cf *Helyear v Hawke* (1803) 5 Esp 72, where the employee's authority extended to giving a warranty; see also *Miller v Lawton* (1864) 15 CBNS 834.

<sup>3</sup> *Howard v Sheward* (1866) LR 2 CP 148. See also *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805, [1951] 1 All ER 631, CA.

<sup>4</sup> See *Cox v Midland Counties Rly Co* (1849) 3 Exch 268; cf *Reynolds v Jex* (1865) 7 B & S 86.



Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1178. Notice of determination of authority.

**1178. Notice of determination of authority.**

Where an employee has been authorised to enter into contracts on his employer's behalf, the employer may be liable upon contracts made by his employee with persons with whom he has been dealing on his employer's behalf, even after his employment has ended or the authority has been otherwise withdrawn<sup>1</sup>. The employer will continue to incur such liability until those persons have received notice<sup>2</sup> that the authority has been withdrawn<sup>3</sup>. It is immaterial whether the original authority was express<sup>4</sup> or whether it was to be implied from the employee's employment<sup>5</sup> or from the employer's conduct<sup>6</sup>.

<sup>1</sup> See AGENCY vol 1 (2008) PARA 192.

<sup>2</sup> It may not be sufficient to give notice to an employee of a person with whom the employee has dealt on behalf of his employer: *Gratland v Freeman* (1800) 3 Esp 85. It may, however, be inferred from circumstances such as the lapse of time, or the failure to send in accounts to the employer, that such person is aware of the revocation of authority: *Stavely v Uzielli* (1860) 2 F & F 30.

<sup>3</sup> *Aste v Montague* (1858) 1 F & F 264; cf *Anon v Harrison* (1699) 12 Mod Rep 346.

<sup>4</sup> *Curlewis v Birkbeck* (1863) 3 F & F 894.

<sup>5</sup> *Aste v Montague* (1858) 1 F & F 264.

<sup>6</sup> *Stavely v Uzielli* (1860) 2 F & F 30; *Summers v Solomon* (1857) 7 E & B 879.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT:  
CONTRACTUAL LIABILITIES TO THIRD PERSONS/1179. Employer under disability.

**1179. Employer under disability.**

Although an employer who is under a disability is not necessarily precluded from entering into a valid contract of employment<sup>1</sup>, his liability for the employee's acts depends on the nature and extent of the disability to which he is subject.

<sup>1</sup> See EMPLOYMENT vol 39 (2009) PARA 16.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT:  
CONTRACTUAL LIABILITIES TO THIRD PERSONS/1180. Employer a minor.

**1180. Employer a minor.**

The employee of a minor may have an implied authority to pledge his employer's credit for necessities<sup>1</sup>, or on his behalf to enter into a contract, such as a contract for the purchase of land<sup>2</sup>, belonging to the class of contracts which are binding on the minor, unless expressly repudiated on his coming of age<sup>3</sup>.

The employee of a minor may also have an implied authority to protect his employer's property, and may therefore be entitled to expel a trespasser<sup>4</sup>.

<sup>1</sup> See *Chapple v Cooper* (1844) 13 M & W 252 at 258, per Alderson B; *Hands v Slaney* (1800) 8 Term Rep 578; and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 18-19.

<sup>2</sup> *Whittingham v Murdy* (1889) 60 LT 956.

<sup>3</sup> As to such contracts, see *Duncan v Dixon* (1890) 44 Ch D 211; *Carter v Silber* [1892] 2 Ch 278, CA; affirmed sub nom *Edwards v Carter* [1893] AC 360, HL; *Viditz v O'Hagan* [1900] 2 Ch 87, CA; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq.

<sup>4</sup> *Ewer v Jones* (1846) 9 QB 623; see AGENCY vol 1 (2008) PARA 5.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT:  
CONTRACTUAL LIABILITIES TO THIRD PERSONS/1181. Employer suffering from mental disorder.

**1181. Employer suffering from mental disorder.**

Where an employer is suffering from mental disorder he cannot, as a general rule, be made liable for the acts of persons to act on his behalf<sup>1</sup>. There may, however, be an implied authority to pledge his credit for the expenses necessary for the protection of his person or estate<sup>2</sup>, although the implication of authority is rebutted by evidence that the person who is alleged to have pledged the credit had sufficient money in hand belonging to the estate of the person suffering from mental disorder<sup>3</sup>. Where the employer begins to suffer from mental disorder after the contract of employment has been entered into, the effect of his disorder is to revoke any authority which the employee may possess<sup>4</sup>. The employer remains liable, however, upon all contracts made by the employee within the scope of his authority, provided they are made with persons to whom the employer, before his mental disorder, held out the employee as having authority to contract on his behalf, and provided those persons, at the time of making the contract, were not aware of the employer's mental disorder and consequent revocation of authority<sup>5</sup>.

1 *Richardson v Du Bois* (1869) LR 5 QB 51; see generally MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq.

2 *Williams v Wentworth* (1842) 5 Beav 325; cf *Re Wood's Estate*, *Davidson v Wood* (1863) 1 De GJ & Sm 465; *Read v Legard* (1851) 6 Exch 636; and see MENTAL HEALTH.

3 *Richardson v Du Bois* (1869) LR 5 QB 51.

4 *Drew v Nunn* (1879) 4 QBD 661, CA; *Richardson v Du Bois* (1869) LR 5 QB 51.

5 *Drew v Nunn* (1879) 4 QBD 661, CA; and see *Yonge v Toynbee* [1910] 1 KB 215, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1182. Corporations.

### **1182. Corporations.**

Where the employer is a corporation aggregate, the identification of the employer with the acts of the employee is much closer than where the employer is an individual, since the corporation is incapable of doing any act itself but must necessarily avail itself of the services of others<sup>1</sup>. The liability of the corporation is nevertheless governed by the same general principles as in the case of an individual<sup>2</sup>. There is a common law rule that no employee can, even with express authority, bind a corporation to an act which is ultra vires the corporation<sup>3</sup>. Thus, where the employee of a corporation created by statute enters into a contract which is not expressly or impliedly authorised by its constitution, the corporation is not bound<sup>4</sup>, even by a subsequent ratification<sup>5</sup>. This rule is, however, subject to a statutory exception in favour of persons dealing with a company in good faith<sup>6</sup>.

1 *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93 at 104, per Blackburn J. As to the position of corporations generally, see CORPORATIONS.

2 See PARA 1170 et seq.

3 *Montreal Assurance Co v M'Gillivray* (1859) 13 Moo PCC 87; see further CORPORATIONS vol 9(2) (2006 Reissue) PARA 1276. As to the liability of a corporation for the torts of its employees, see TORT vol 45(2) (Reissue) PARA 326.

4 *Directors of Shewsbury and Birmingham Rly Co v Directors of North-Western Rly Co* (1857) 6 HL Cas 113, approving *South Yorkshire Rly & River Dun Co v Great Northern Rly* (1853) 9 Exch 55 at 84, per Parke B; *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 354, HL.

5 *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653; applied in *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 354. HL.

6 See Companies Act 2006 ss 39, 40: see COMPANIES vol 14 (2009) PARAS 263, 265.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1183. Liability of trustees and personal representatives for employees' acts.

**1183. Liability of trustees and personal representatives for employees' acts.**

Private trustees, personal representatives and other persons in a fiduciary position who are obliged, for the due performance of their duties, to engage employees, are liable personally for their employees' acts<sup>1</sup> done in the course of their employment and within the scope of their authority<sup>2</sup>. They are, however, entitled to be indemnified out of the trust estate, whether their liability is founded upon contract<sup>3</sup> or upon tort<sup>4</sup>, provided the liability was incurred in the reasonable and proper management of the estate. Any third person who has succeeded in establishing the liability of a personal representative or trustee for any act done by his employee is subrogated to the right of indemnity of the representative or trustee, and may claim direct against the trust estate, whether he has recovered judgment against the personal representative or trustee in contract<sup>5</sup> or in tort<sup>6</sup>.

<sup>1</sup> As to certain statutory powers conferred on trustees and personal representatives to employ agents without being responsible for the default of the agents if employed in good faith, see the Trustee Act 1925 s 23(1), and EXECUTORS AND ADMINISTRATORS; TRUSTS vol 48 (2007 Reissue) PARA 998.

<sup>2</sup> For the meanings of 'course of employment' and 'scope of authority', see TORT. Cf *Brazier v Camp* (1894) 63 LJQB 257, CA; and see generally EXECUTORS AND ADMINISTRATORS; TRUSTS.

<sup>3</sup> *Farhall v Farhall* (1871) 7 Ch App 123. They may be entitled to be indemnified personally by the beneficiary if the trust estate is insufficient (*Matthews v Ruggles-Brise* [1911] 1 Ch 194, applying *Jervis v Wolferstan* (1874) LR 18 Eq 18 at 24, per Jessel MR; *Fraser v Murdoch* (1881) 6 App Cas 855 at 872, HL, per Lord Blackburn, and *Hardoon v Belilios* [1901] AC 118 at 123, PC); but this principle does not apply to a receiver and manager appointed by the court, who can look to the assets under the control of the court only (*Boehm v Goodall* [1911] 1 Ch 155). See RECEIVERS.

<sup>4</sup> *Benett v Wyndham* (1862) 4 De GF & J 259.

<sup>5</sup> *Dowse v Gorton* [1891] AC 190, HL; *Re Blundell, Blundell v Blundell* (1890) 44 Ch D 1, CA; *Flower v Prechtel* (1934) 150 LT 491, CA; cf *Re Richardson, ex p Governors of St Thomas's Hospital* [1911] 2 KB 705, CA.

<sup>6</sup> *Re Raybould, Raybould v Turner* [1900] 1 Ch 199; and see *Flower v Prechtel* (1934) 150 LT 491, CA.

Halsbury's Laws of England/CONTRACT (VOLUME 9(1) (REISSUE))/10A. EMPLOYMENT: CONTRACTUAL LIABILITIES TO THIRD PERSONS/1184. Crown's liability on contracts.

**1184. Crown's liability on contracts.**

A petition of right formerly lay at the instance of a subject in the event of a breach by the Crown of a contract entered into with the subject by a person having authority to contract on behalf of the Crown<sup>1</sup>; in such an event the subject is now entitled to bring an action for breach of contract<sup>2</sup>.

<sup>1</sup> See eg *Thomas v R* (1874) LR 10 QB 31; *Yeoman v R* [1904] 2 KB 429, CA; and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 110. For the principle that Crown servants are not in general personally liable on contracts, see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 388.

<sup>2</sup> See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 382. For the principle that civil proceedings against the Crown are now in general instituted and carried on in accordance with the ordinary rules of court, and for particular provisions relating to such proceedings, see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARAS 117, 118.